File No. S-1510120
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

AND

IN THE MATTER OF THE *BUSINESS CORPORATIONS ACT*, S.B.C. 2002, c. 57, AS AMENDED

AND

IN THE MATTER OF THE PLAN OF COMPROMISE AND ARRANGEMENT OF NEW WALTER ENERGY CANADA HOLDINGS, INC., NEW WALTER CANADIAN COAL CORP., NEW BRULE COAL CORP., NEW WILLOW CREEK COAL CORP., NEW WOLVERINE COAL CORP. AND CAMBRIAN ENERGYBUILD HOLDINGS ULC

PETITIONERS

TENTH REPORT OF THE MONITOR, KPMG INC.

May 24, 2017

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INTRODUCTION AND SUMMARY OF PROCEEDINGS

1. KPMG Inc. ("**KPMG**" or the "**Monitor**") was appointed as Monitor pursuant to the order (the "**Initial Order**") issued by this Honourable Court on December 7, 2015 (the "**Filing Date**") in respect of the motion (the "**Application**") filed by Walter Energy Canada Holdings, Inc. ("**WECH**"), Walter Canadian Coal ULC, Wolverine Coal ULC, Brule Coal ULC, Cambrian Energybuild Holdings ULC, Willow Creek Coal ULC, Pine Valley Coal Ltd. and 0541237 B.C. Ltd. (collectively, the "**Original Petitioners**") under the *Companies' Creditors Arrangement Act*, R.S.C 1985, c. C-36, as amended (the "**CCAA**") granting, *inter alia*, a stay of proceedings (the "**Stay**") until January 6, 2016. The proceedings brought by the Original Petitioners under the CCAA will be referred to herein as the "**CCAA Proceedings**".

2. Pursuant to the Initial Order, the Stay and certain other relief was extended to certain of the Original Petitioners' partnerships (collectively with the Original Petitioners, "**Old Walter Canada**"):

   i) Walter Canadian Coal Partnership ("**WCCP**");

   ii) Wolverine Coal Partnership;

   iii) Brule Coal Partnership; and

   iv) Willow Creek Coal Partnership.

3. On December 7, 2016, this Honourable Court heard Old Walter Canada's application for approval of a transaction in respect of the sale of and investment in Old Walter Canada (the "**Remaining Assets Transaction**") and this Honourable Court granted an order (the "**New Walter Group Procedure Order**") approving, among other things, the Remaining Assets Transaction and authorizing Old Walter Canada to initiate proceedings under the *Bankruptcy and Insolvency Act* (the "**BIA**") to complete the Remaining Assets Transaction.

4. The Walter Group Procedure Order also authorized the formation of the following entities, which were formed on December 8, 2016 (collectively, the "**New Walter Group**") and became petitioners in the CCAA Proceedings as at that date pursuant to the New Walter Group Procedure Order:

i) New Walter Energy Canada Holdings, Inc. ("**New WECH**");

ii) New Walter Canadian Coal Corp. ("**New WCCC**");

iii) New Brule Coal Corp.;

iv) New Willow Creek Coal Corp.; and

v) New Wolverine Coal Corp.

5. In accordance with the terms of the Remaining Assets Transaction and BIA proceedings, the CCAA Proceedings in respect of all of the Old Walter Canada entities, except for Cambrian Energybuild Holdings ULC ("**Cambrian**"), were terminated effective on December 28, 2016, pursuant to an order pronounced by this Honourable Court on December 21, 2016 (the "**CCAA Continuity & Vesting Order**") that also, among other things, provided that the CCAA Proceedings shall continue with respect to every member of the New Walter Group and Cambrian and transferred WCCP's 50% interest (the "**Belcourt Interest**") in Belcourt Saxon Coal Ltd. ("**BSCL**") and Belcourt Saxon Coal Limited Partnership ("**BSCLP**") to New WCCC.

6. Accordingly, after December 28, 2016, the CCAA Proceedings are in respect only of each of the five members of the New Walter Group and Cambrian (together, "**Walter Canada**") and the Stay and other relief granted pursuant to the Initial Order applies to Walter Canada. The limited stay of proceedings provided for in paragraph 20 of the Initial Order with respect to BSCL and BSCLP remains in place.

Summary of Proceedings

7. On December 7, 2015, KPMG filed the Pre-Filing Report of the Proposed Monitor (the "**Pre-Filing Report**"), which, amongst other things, described certain of Walter Canada's background information, its cash flow forecast and the current status of its operations.

8. This is the tenth report of the Monitor (the "**Tenth Report**") since the Initial Order was granted. The nine previous reports are referred to herein, collectively, as the "**Previous Reports**". Terms not specifically defined herein shall have the meanings as defined in the Previous Reports or the Claims Process Order, which was granted by this Honourable Court on August 16, 2016.

9. The Monitor maintains a website at www.kpmg.com/ca/walterenergycanada (the "**Monitor's Website**") on which copies of the Previous Reports as well as additional information regarding these CCAA Proceedings can be found.

10. Readers are directed to the Eighth Report of the Monitor dated January 12, 2017 (the "**Eighth Report**") for a comprehensive summary of the CCAA Proceedings up to the date of that report. An update on the status of the CCAA Proceedings since the date of the Eighth Report is provided below.

11. On January 16, 2017, this Honourable Court granted an order extending the Stay up to and including May 31, 2017.

12. On March 10, 2017, KPMG filed the Ninth Report of the Monitor (the "**Ninth Report**") which was a special purpose report with respect to the planned distribution of certain funds (the "**Fund Distribution**") which were held in trust by Victory Square Law Office LLP, counsel for the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, Local 1-424 ("**USW**"), in the amount of $780,660.61 as at January 18, 2017 (the "**Fund**").

13. On March 13, 2017, this Honourable Court granted an order that authorized and directed the Monitor to receive the Fund from counsel for the USW and to distribute it, and any additional interest accruing thereon after January 18, 2017, to those members of the USW who were entitled to receive a *pro rata* share of the Fund (the "**Fund Distribution Order**").

PURPOSE OF THE MONITOR'S REPORT

14. The purpose of this Tenth Report is to provide this Honourable Court with information regarding the following:

    a) An update regarding the Claims Process and the status of certain unresolved Claims;

    b) An update in respect of the Fund Distribution;

    c) A discussion of matters pertaining to Walter Canada's remaining assets, including efforts to realize on them and Walter Canada's request for authorization from this Honourable Court to advance additional funds to Walter UK;

d) Walter Canada's actual cash flow results for the 19-week period ended May 13, 2017 as compared to the 22-week forecast for the period ending June 3, 2017 (the "**Previous CCAA Cash Flow Forecast**");

e) Walter Canada's updated cash flow forecast for the 20-week period ending September 30, 2017 (the "**Updated CCAA Cash Flow Forecast**");

f) An update in respect of certain additional matters; and

g) The Monitor's observations and recommendations in respect of Walter Canada's motion returnable May 30, 2017 seeking an extension of the Stay to September 29, 2017 (the "**Extended Stay Period**") and certain other relief.

REPORT RESTRICTIONS AND SCOPE LIMITATIONS

15. In preparing this report and making the comments herein, the Monitor has been provided with, and has relied upon, unaudited financial information, books and records and financial information prepared by Walter Canada and/or certain of its affiliates, discussions with management of Walter Canada ("**Management**") and information from other public third-party sources (collectively, the "**Information**"). Except as described in this report in respect of the Previous CCAA Cash Flow Forecast and the Updated CCAA Cash Flow Forecast:

    a) The Monitor has reviewed the Information for reasonableness, internal consistency and use in the context in which it was provided. However, the Monitor has not audited or otherwise attempted to verify the accuracy or completeness of the Information in a manner that would wholly or partially comply with Canadian Auditing Standards pursuant to the *Chartered Professional Accountants Canada Handbook* and, accordingly, the Monitor expresses no opinion or other form of assurance in respect of the Information; and

    b) Some of the information referred to in this report consists of forecasts and projections. An examination or review of the financial forecasts and projections, as outlined in the *Chartered Professional Accountants Canada Handbook*, has not been performed.

16. Future oriented financial information referred to in this report was prepared based on Management's estimates and assumptions. Readers are cautioned that since projections are based upon assumptions about future events and conditions that are not ascertainable, the actual results will vary from the projections, even if the assumptions materialize, and the variations could be material.

17. The information contained in this report is not intended to be relied upon by any prospective purchaser or investor in any transaction with Walter Canada.

18. Unless otherwise stated, all monetary amounts contained herein are expressed in Canadian Dollars.

CLAIMS PROCESS UPDATE

1974 Pension Plan Claim

19. Arguments in respect of the US$904 million disputed Claim of the United Mine Workers of America 1974 Pension Plan and Trust (the "**1974 Pension Plan**") were heard by this Honourable Court over nine days during January 2017.

20. On May 1, 2017, this Honourable Court delivered its judgment in respect of the 1974 Pension Plan Claim in the form of the written Reasons for Judgment of the Honourable Madam Justice Fitzpatrick (the "**Reasons**", a copy of which is attached hereto as Schedule "A").

21. Pursuant to the Reasons, this Honourable Court considered three issues in respect of which Walter Canada (and the USW) was seeking declaratory relief:

    a) That the 1974 Pension Plan Claim as against Walter Canada is governed by Canadian substantive law and not U.S. substantive law including the *Employee Retirement and Income Security Act of 1974*, 29 U.S.C. 1001, as amended ("**ERISA**"), the U.S. legislation upon which the 1974 Pension Plan Claim is based;

    b) That, if the 1974 Pension Plan Claim is governed by U.S substantive law, then as a matter of U.S. law, "controlled group" liability for withdrawal liability related to a multiemployer pension plan under ERISA does not extend extraterritorially; and

    c) That, if the 1974 Pension Plan Claim is governed by U.S substantive law and ERISA applies extraterritorially, that law is unenforceable in Canada because it conflicts with Canadian public policy.

22. Walter Canada only needed to succeed on any one of the above three arguments for the 1974 Pension Plan's Claim to be found invalid as against the estate.

23. In the Reasons, the Honourable Madam Justice Fitzpatrick granted a declaration that, under Canadian conflict of law rules, the 1974 Pension Plan's Claim as against Walter Canada is governed by Canadian substantive law and not U.S. law (including ERISA) and therefore

dismissed the 1974 Pension Plan's Claim as against the estate for that reason (the "**Judgment**"). In the circumstances, Madam Justice Fitzpatrick determined that she did not have to make a decision on the other two issues so that these CCAA Proceedings would not be further delayed.

24. The 1974 Pension Plan had 21 days from the date of the release of the Reasons in which to seek leave to appeal the Judgment.

25. On May 4, 2017, counsel for the 1974 Pension Plan notified Walter Canada's counsel, the Monitor and its counsel, and the USW's counsel that it had been instructed to seek leave to appeal the Judgment and further expressed that it believed it reasonable to request that the recipient parties consent to leave being granted.

26. On May 19, 2017, counsel for the 1974 Pension Plan filed a Notice of Application for Leave to Appeal with the Court of Appeal for British Columbia, in which the grounds of appeal are that the Honourable Madam Justice Fitzpatrick erred in law: (i) in holding that the 1974 Pension Plan's Claim is governed by Canadian substantive law and not U.S. substantive law; and (ii) in making an order as to costs in the CCAA Proceedings. Counsel for the 1974 Pension Plan served its Notice of Application for Leave to Appeal on May 23, 2017.

27. As at the date of this report, neither Walter Canada nor the USW has consented to the requested leave to appeal being granted, and the 1974 Pension Plan's application is scheduled to be heard on June 9, 2017.

28. The Monitor, without taking a position on the merits of the 1974 Pension Plan's application for leave to appeal the Judgment, wishes to highlight for this Honourable Court that such an appeal, if commenced, may significantly delay any potential distribution to Walter Canada's 314 Claimants, the majority of which are former employees, due to the uncertainty as to the timing for the hearing of an appeal if leave to appeal is granted.

Recently Resolved Claims

29. Two Claims which had been unresolved as at the date of the Eighth Report have now been resolved, of which one is now considered an Allowed Claim and has increased the total amount of Allowed Claims to $13.4 million.

30. The first recently resolved Claim is that of Mr. Joseph Strong in the amount of approximately $51,000 relating to outstanding contractual severance, group termination and 60 days' pay in lieu of notice related to s. 54(1) of the *Labour Relations Code*. In response to the Notice of Revision or Disallowance ("**NORD**") which the Monitor sent to Mr. Strong on December 21, 2016, Mr. Strong submitted a sworn affidavit to the Monitor on February 1, 2017 and the USW's counsel also provided additional evidence concerning the date of Mr. Strong's layoff. Based on its review of this new evidence, the Monitor, in consultation with Walter Canada, accepted Mr. Strong's Claim as an Allowed Claim on February 22, 2017.

31. The second Claim which has been resolved since the date of the Eight Report is that of the West Moberly First Nation ("**West Moberly**"). The Monitor disallowed the Claim of West Moberly in a NORD on the basis that: (i) the Claim was premature as Walter Canada had not disclaimed the agreements with West Moberly, and in any event, it is the responsibility of Conuma Coal Resources Limited ("**Conuma**"), the purchaser of substantially all of the assets of Old Walter Canada, to assume the contracts with West Moberly; and (ii) there were no amounts owing by Walter Canada to West Moberly. Pursuant to the Claims Process Order, West Moberly had twenty business days from the December 19, 2016 date of issuance of the NORD by the Monitor to submit a Notice of Dispute. The Monitor did not receive a Notice of Dispute from West Moberly.

Update on Unresolved Claims

32. An update in respect of the remaining seven unresolved Claims is provided below and summarized in the following table:

Summary of Unresolved Claims as at the Date of this Report		
(CAD $000)	**Claim Type**	**Amount**
James, Kevin	Restructuring	6,747
USW	Employee	293
USW	Pre-Commencement	12
Warrior Met Coal LLC	Pre-Commencement	9,892
Mitsui Matsushima Co. Ltd.	Restructuring	810
Pelly Construction Ltd.	Pre-Commencement	1,323
1974 Pension Plan Claim	UMWA 1974 Pension Plan	1,220,896
Total Unresolved Claims		**1,239,973**

a) On March 28, 2017, the Monitor issued notices to each of Mr. Kevin James, the USW, Warrior Met Coal LLC ("**Warrior**") and Mitsui Matsushima Co. Ltd. ("**Mitsui**") extending the date by which a disputing party must bring a motion before this Honourable Court to resolve their disputed Claim to the date that is thirty days following the date on which this Honourable Court issued the Judgment. Since the May 1, 2017 issuance of the Judgment, the Monitor has issued notices to each of Mr. James, the USW and Warrior to further extend the date by which a disputing party must bring a motion to the date that is thirty days from the date that the Monitor notifies the party to bring such a motion.

In respect of the Claim from Mitsui, the Monitor, in consultation with Walter Canada, continues to have dialogue with Mitsui with the aim of moving their Claim forward in the Claims Process. As the Mitsui disputed Claim arises from a disclaimer of a contract, it falls within the timelines for Restructuring Claims in the Claims Process Order. As of the date of this report, the date by which Mitsui must deliver its Notice of Dispute in respect of its disputed Claim has yet to be extended.

b) The $1.3 million disputed portion of the Claim of Pelly Construction Ltd. ("**Pelly**"), which was discussed in the Eighth Report, remains unresolved as at the date of this report because Pelly has until July 31, 2017 to complete the camp demobilization process, failing which the $1.3 million disputed portion of Pelly's Claim will be disallowed.

c) Although the 1974 Pension Plan Claim was dismissed pursuant to the Judgment, it is listed in the table above as an unresolved Claim because of the 1974 Pension Plan's previously discussed pending application for leave to appeal the Judgment.

Update on Other Claim Matters

33. Further to discussion in the Fifth Report and the Eighth Report in respect of a potential Claim from Canada Revenue Agency ("**CRA**") relating to 2014 and 2015 payroll source deductions, CRA concluded its trust examination in late January 2017 and determined that it did not have a Claim and that instead Walter Canada was owed a refund in the amount of approximately $107,000, which was collected by the Monitor in February 2017.

34. As noted in the Eighth Report, two claims totaling approximately $4,000 were filed with the Bankruptcy/Proposal Trustee. Both of these claims appear to be valid and have now been admitted and will be dealt with in the same manner as the other Allowed Claims in the CCAA proceedings pursuant to the Claims Process Order.

35. The Monitor is still assessing whether a claim in respect of the Deemed Interest Amount (as defined in the Proposal) against New WECH in relation to the US$2.0 billion hybrid debt transaction is valid and whether proceeds will be available to satisfy such claim.

36. As the assignment of certain contracts to Conuma has not been completed, additional Claims may be received in due course.

STATUS OF THE FUND DISTRIBUTION

37. Pursuant to the Fund Distribution Order, and as more thoroughly discussed in the Ninth Report, this Honourable Court directed the Monitor to collect the Fund from counsel for the USW and to disburse it to the members of the USW entitled to receive a *pro rata* share of the Fund (each a "**Subject Employee**").

38. The Monitor received the Fund plus some additional interest (for a total amount of $781,719.32) from counsel for the USW on March 15, 2017. As noted in the Ninth Report, the distribution of the Fund will result in a partial payment of each Subject Employee's Claim related to section 54 of the B.C. *Labour Relations Code* and each Subject Employee's Claim will be reduced accordingly.

39. Given that the Fund that is to be distributed to the Subject Employees relates to payment of arrears of wages and earnings, s. 46 of the *Employment Insurance Act* requires that the Monitor ascertain from Service Canada whether any Employment Insurance benefit overpayment amounts for the Subject Employees are repayable to the Receiver General prior to completing the Fund Distribution.

40. The Monitor submitted the requisite information to Service Canada on March 16, 2017 to enable it to perform its review for possible Employment Insurance benefit overpayments. The Monitor has had weekly correspondence with a representative of Service Canada to monitor the progress of the review. As at the date of this report, Service Canada has estimated that it may complete its review by mid-June 2017, following which it will deliver a letter to the Monitor setting out any required benefit repayments (the "**Determination Letter**"). The Monitor shall complete the Fund Distribution, including making the requisite deduction and remittance of any Employment Insurance overpayment amounts, as quickly as reasonably possible following receipt of the Determination Letter.

STATUS OF WALTER CANADA'S REMAINING ASSETS

Update on Efforts to Realize on Belcourt Interest

41. Included in the asset purchase agreement entered into between Old Walter Canada and Conuma (the "**APA**") on August 8, 2016 and approved by this Honourable Court on August 16, 2016, was an offer from Conuma to acquire the Belcourt Interest from WCCP. The Monitor continues to hold a portion of the Conuma Transaction proceeds as a deposit in relation to the sale of the Belcourt Interest.

42. On April 24, 2017, Conuma submitted an Offer to Purchase Ownership Interest (the "**Third Party Offer**") to New WCCC (the current holder of the Belcourt Interest) that included a significantly higher offer price for the Belcourt Interest than had been included in the APA. New WCCC delivered its Indication of Willingness to Accept Third Party Offer to Conuma on April 27, 2017.

43. The other party to the Belcourt Saxon joint venture, Peace River Coal Inc. ("**PRC**"), has the right of first refusal (the "**ROFR**") and certain tag along rights pursuant to the Belcourt Saxon Coal Limited Partnership Agreement between Western Canadian Coal Corp. (the predecessor-in-interest to WCCP and New WCCC) and NEMI Northern Energy & Mining Inc. (the predecessor-in-interest to PRC) dated March 2, 2005 (the "**BelSax LPA**").

44. As such, on May 2, 2017, New WCCC sent a Notice of Third Party Offer to PRC detailing the Third Party Offer, an offer to sell the Belcourt Interest to PRC on substantially the same terms, as required by the BelSax LPA, and a request that PRC waive the ROFR. PRC has 45 days following receipt of that notice in which to notify Walter Canada of its decision to permit the sale of the Belcourt Interest or exercise its ROFR.

45. Walter Canada anticipates that it may be seeking approval from this Honourable Court to enter into a transaction in respect of the Belcourt Interest by as early as the latter part of June 2017; however, the timeline is uncertain as it depends to a large part on PRC's decisions about how it will respond to the Notice of Third Party Offer it received from New WCCC. The Monitor will report to this Honourable Court regarding this matter either at the time of any application made by Walter Canada for approval of a transaction or at such other time as there are significant developments.

Walter UK

Update on Realization Process

46. Walter Canada is continuing its efforts to realize on Walter UK. The primary asset of Walter UK is Energybuild Ltd. ("**Energybuild**") which owns the anthracite coal mine in South Wales that is currently in care and maintenance.

47. An interested party in respect of the sale of Walter UK has been identified and discussions are ongoing. However, the interested party has requested the resolution of certain conditions, including relating to claims that may be made against Energybuild and its subsidiaries, prior to the finalization of any potential sale. Walter Canada has reached out to the parties involved and is working to resolve these conditions in a timely manner.

48. The Monitor shall provide this Honourable Court with updates regarding any potential sale in respect of Walter UK as it deems necessary.

Additional Funding Requirements

49. This Honourable Court, pursuant to the CCAA Continuity & Vesting Order, authorized Cambrian to loan up to £250,000 to Energybuild on a secured basis and, to date, the full amount of those authorized loans has been advanced to Energybuild.

50. Walter UK's latest updated cash flow forecast indicates that it has insufficient liquidity to meet its obligations as they come due after approximately June 23, 2017. As a result, Walter Canada is seeking authorization from this Honourable Court for Cambrian to advance up to an additional £350,000 (approximately $620,000 based on the exchange rates in effect as at the date of this report), on a secured basis, to Energybuild which should provide Energybuild with sufficient liquidity until approximately the middle of October 2017. Funding requirements are expected to be lower if a sale can be concluded by an earlier date.

51. The Monitor is of the view that it would be reasonable for this Honourable Court to authorize Cambrian to loan the requested additional advance, on a secured basis, to Energybuild to provide additional time for its directors, as well as the Chief Restructuring Officer ("**CRO**") and Walter Canada, to either conclude a sale or determine a plan for disposing of Walter UK.

ACTUAL RECEIPTS AND DISBURSEMENTS COMPARED TO FORECAST

52. Walter Canada's actual cash receipts and disbursements for the 19-week period ended May 13, 2017 (the "**Reporting Period**"), as compared with the Previous CCAA Cash Flow Forecast, are summarized in the table below:

Walter Canada Summary of Actual versus Forecast Cash Flow **For the 19-Week Period Ended May 13, 2017[1]** **Prepared on a Consolidated Basis** **Unaudited (CAD $000)**	**Actual**	**Forecast**	**Variance**
Cash Inflow			
Other Receipts	932	40	892
Total Cash Inflow	**932**	**40**	**892**
Cash Outflow - Operating Disbursements			
Director's Fees	(56)	(60)	4
Consulting	(87)	(100)	13
Insurance	(20)	-	(20)
Professional Fees	(14)	(40)	26
Maintenance and Supplies	(62)	(63)	1
Information Technology	(43)	(45)	2
Total Cash Outflows - Operating Disbursements	**(282)**	**(308)**	**26**
Cash Outflow - Non-Operating Disbursements			
CRO and Restructuring Advisor Fees	(4,043)	(4,155)	112
Success Fees	(1,485)	(1,750)	265
Transfer of GIC's	(200)	(200)	-
Belcourt Saxon J.V. Funding	(153)	-	(153)
Walter U.K. Funding	(412)	(180)	(232)
Total Cash Outflows - Non-Operating Disbursements	**(6,293)**	**(6,285)**	**(8)**
Net Cash Flow	**(5,643)**	**(6,553)**	**910**
Cash, beginning of period (January 1, 2017)	**70,114**	**70,114**	**-**
Effect of Foreign Exchange translation	**82**	**-**	**82**
Cash, end of period (May 13, 2017)[2]	**64,553**	**63,561**	**992**

Note 1: Readers are cautioned to read the "Report Restrictions and Scope Limitations" section of this report.

Note 2: The cash position noted above excludes approximately US$270K that was received upon closing of Walter Canada's previous account network at the Bank of Nova Scotia. This amount is excluded as discussions as to whether these funds belong to Walter Canada or Warrior are ongoing.

53. The following is a summary of the more significant variances in respect of the $992,000 aggregate net favourable cash flow variance during the Reporting Period:

a) The majority of the aggregate net favourable variance relates to the Monitor's collection of the Fund, in the amount of approximately $782,000, from counsel for the USW, as previously discussed herein. This cash receipt represents a permanent favourable difference as it was not contemplated in the Previous CCAA Cash Flow Forecast and the Monitor notes that it will be paid out in full once the Monitor completes the Fund Distribution after it receives the Determination Letter from Service Canada.

   Also as previously discussed herein, Walter Canada received a refund from CRA in the amount of approximately $107,000 related to the trust examination of certain payroll accounts which was performed by the CRA in early January. This cash receipt was not included in the Previous CCAA Cash Flow Forecast as the outcome of the trust examination was unknown at the time it was prepared; accordingly, this represents a permanent favourable difference;

b) The $112,000 favourable variance for CRO and Restructuring Advisor Fees during the Reporting Period was the result of actual costs having been lower than forecast due to lower levels of activity in the month of March 2017 than had been anticipated;

c) Certain success fees related to the transaction that was completed in December 2016 have yet to be paid and are not expected to be paid until the completion of all remaining transactions;

d) The $153,000 negative variance for Belcourt Saxon J.V. funding was the result of Walter Canada being required to fund an unexpected cash call on March 6, 2017, relating to the renewal of certain coal licenses and permits; and

e) Pursuant to the CCAA Continuity & Vesting Order, Cambrian was authorized to loan Energybuild up to £250,000 on a secured basis. Advances of £110,000 and £140,000 were made on February 6 and April 13, 2017, respectively, to fund working capital needs while the negotiation of the sale of certain Walter UK entities continues. The two funding payments translated to approximately $412,000 and resulted in a permanent unfavourable difference of $232,000 as only £110,000 of funding was contemplated in the Previous CCAA Cash Flow Forecast.

f) The amount held by Walter Canada as a deposit in relation to the Conuma Transaction and the potential sale of the Belcourt Interest has been segregated in a separate bank account and is not included in the analysis above for confidentiality reasons.

UPDATED CCAA CASH FLOW FORECAST

54. The Updated CCAA Cash Flow Forecast has been prepared by Walter Canada, with the assistance of the Monitor, on a consolidated basis for the 20-week period ending September 30, 2017 (the "**Updated Cash Flow Period**") to correspond with the Extended Stay Period being sought by Walter Canada, and reflects certain updated assumptions of Management based on developments to date during the course of these CCAA Proceedings. A copy of the Updated CCAA Cash Flow Forecast is attached hereto as Schedule "B" and is summarized in the table below:

Walter Canada Summary of the Updated CCAA Cash Flow Forecast For the 20-Week Period from May 14, 2017 to September 30, 2017 [1] **Prepared on a Consolidated Basis Unaudited (CAD $000)**	
Cash Inflow	
Other Receipts	25
Total Cash Inflow	**25**
Cash Outflow - Operating Disbursements	
Director's Fees	(60)
Consulting	(122)
Insurance	(25)
Information Technology	(5)
Total Cash Outflows - Operating Disbursements	**(212)**
Cash Outflow - Non-Operating Disbursements	
CRO and Restructuring Advisor Fees	(1,527)
Walter U.K. Funding	(620)
Belcourt-Saxon J.V. Funding	(425)
Distribution of Trust Funds	(782)
Total Cash Outflows - Non-Operating Disbursements	**(3,354)**
Net Cash Flow	**(3,541)**
Cash, beginning of period (May 14, 2017)	**64,553**
Cash, end of period (September 30, 2017)	**61,012**
Note 1: Readers are cautioned to read the "Report Restrictions and Scope Limitations" section of this report.	

55. Net cash outflows during the Updated Cash Flow Period are expected to total approximately $3.5 million, which Walter Canada will fund from its current cash resources on hand. On September 30, 2017, at the end of the Updated Cash Flow Period, Walter Canada expects to have approximately $61 million of combined cash resources remaining.

56. The following is a summary of the more significant components of the Updated CCAA Cash Flow Forecast:

a) Interest income of $25,000 is expected to be earned on Walter Canada's cash holdings during the Updated Cash Flow Period and has been categorized under Other Receipts;

b) Director's fees totaling $60,000 relate to Walter Canada's sole director who receives a payment on a monthly basis;

c) Consulting fees totaling $122,000 relate to an external consultant hired by Walter Canada to manage the operations of Walter UK while the sale process is ongoing;

d) A payment of $25,000 is forecast for the renewal of Director and Officer insurance premiums upon the expiry of Walter Canada's current coverage on June 30, 2017;

e) The CRO's monthly fees and Restructuring Advisor Fees are forecast at approximately $1.5 million during the Updated Cash Flow Period for payments to Walter Canada's counsel, the Monitor and its counsel, and the CRO. In the short term, professional fee costs are expected to be higher as a result of the ongoing sale activity for the Belcourt Interest and Walter UK as well as dealing with the upcoming hearings in respect of the 1974 Pension Plan's appeal of the Judgment;

f) As previously noted, Walter Canada has budgeted up to £350,000 (approximately $620,000) to fund the Walter UK operations over the course of the Updated Cash Flow Period while the sale process is ongoing, subject to obtaining authorization from this Honourable Court to make such additional advances;

g) Pursuant to the BelSax LPA, Walter Canada is required to fund 50% of the costs associated with its Belcourt Interest. As such, payments for coal licenses are funded on a quarterly basis. The next payment is expected to be in June 2017, in the amount

of approximately $200,000, with another renewal of approximately $225,000 anticipated to occur in September 2017. In the event the Belcourt Interest is sold, such disbursements will not be funded;

h) As discussed above, the Monitor is anticipating that it may receive the Determination Letter from Service Canada by mid-June, following receipt of which it will make the required deductions and remittances and issue the Fund Distribution as quickly as reasonably possible; and

i) As discussed in the Eighth Report, approximately US$270,000 has been excluded from the Updated CCAA Cash Flow Forecast in relation to the amount received by Walter Canada from BNS when Walter Canada's account network was closed. Discussions with BNS regarding the ownership of these funds, as to whether it belongs to Warrior or Walter Canada, is ongoing and the Monitor will provide an update to this Honourable Court once those discussions are completed and the appropriate disposition of these funds is determined.

57. The Updated CCAA Cash Flow Forecast indicates that Walter Canada has the necessary liquidity to fund its expected cash requirements to the end of the Updated Cash Flow Period.

OTHER MATTERS

58. The Monitor has continued to facilitate the transition of certain financial records to Amacon from Walter Canada, including the preparation of draft financial statements as a result of the Remaining Assets Transaction and the transfer of certain assets from Old Walter Canada to Walter Canada. The Monitor expects to continue to field queries from Amacon over the coming weeks.

59. WCCP was party to two agreements (the "**Twin Sisters Agreements**") in respect of the Twin Sisters Native Plants Nursery Limited Partnership ("**Twin Sisters LP**"). The Twin Sisters LP involved the Saulteau First Nation and the West Moberly First Nation and related to a gift of land near Chetwynd, B.C. from WCCP that was to be used as a plant nursery to aid in remediation efforts for Walter Canada's mines. WCCP retained an option to repurchase the land in certain circumstances and sold this option to Conuma as part of

the transaction in September 2016. However, WCCP's rights regarding the Twin Sisters LP remained with WCCP and were eventually transferred to New WCCC.

60. As a result of the Conuma Transaction, New WCCC had no further reason to be party to the Twin Sisters Agreements and was asked by counsel to the Twin Sisters Native Plants Nursery General Partner Inc. to terminate its interests. With the authorization of both the CRO and Walter Canada's sole director, the Twin Sisters Agreements were terminated effective February 2, 2017, and mutual releases were provided to each of the parties to the Twin Sisters Agreements.

THE MONITOR'S OBSERVATIONS AND RECOMMENDATIONS

61. In the Monitor's opinion, Walter Canada is continuing to act in good faith and with due diligence in furthering its restructuring efforts, including seeking to conclude one or more transactions with respect to the Belcourt Interest and/or Walter UK in an effort to generate additional sale proceeds for the benefit of Walter Canada's creditors and other stakeholders.

62. As a result of the 1974 Pension Plan's recently filed application for leave to appeal the Judgment, the Monitor is not in a position at this time to perform a distribution and any such distribution will likely be delayed until the 1974 Pension Plan's Claim is resolved. Accordingly, the Monitor recommends to this Honourable Court that it grant Walter Canada's request for an extension of the Stay to September 29, 2017 and for authorization for Cambrian to loan up to an additional £350,000, on a secured basis, to Energybuild.

All of which is respectfully submitted this 24th day of May, 2017.

KPMG INC., in its sole capacity as
Monitor of New Walter Energy Canada Holdings, Inc. et al

Per: Anthony Tillman
Senior Vice President

Schedule "A"

Reasons for Judgment of the
Honourable Madam Justice Fitzpatrick dated May 1, 2017

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Walter Energy Canada Holdings, Inc. (Re)*, 2017 BCSC 709

Date: 20170501
Docket: S1510120
Registry: Vancouver

In the Matter of the Companies' Creditors Arrangement Act,
R.S.C. 1985, c. C-36 as Amended

And

In the Matter of the *Business Corporations Act*,
S.B.C. 2002, c. 57, as Amended

And

In the Matter of a Plan of Compromise or Arrangement of Walter Energy Canada Holdings, Inc. and the Other Petitioners Listed on Schedule "A"

The text of the judgment was corrected on page 2 and in paragraph 5 on May 5, 2017.

Before: The Honourable Madam Justice Fitzpatrick

Reasons for Judgment

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Counsel for KPMG Inc., Monitor:	P.J. Reardon
Place and Date of Hearing:	Vancouver, B.C. January 9-13, 16, 18-20, 2017
Place and Date of Written Reasons:	Vancouver, B.C. May 1, 2017

I INTRODUCTION

[1] These are proceedings brought by the petitioners pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "*CCAA*"). The petitioner companies are part of what I will describe as the "Walter Canada Group" which includes other entities, as I will discuss below.

[2] This application is brought by the Walter Canada Group to determine the validity of a claim filed in these proceedings by the UMWA 1974 Pension Plan and Trust (the "1974 Plan").

[3] The 1974 Plan's claim is asserted as a liability of the Walter Canada Group based on the provisions of U.S. legislation, namely the *Employee Retirement and Income Security Act of 1974*, 29 U.S.C. § 1001, as amended ("*ERISA*"). The amount of the claim arises from certain unfunded pension liabilities owed to former

employees of a U.S. entity within the larger international Walter Energy Group. For context, the Walter Canada Group is the Canadian part of the international "Walter Energy Group". *ERISA* is sometimes referred to as "long arm" legislation in that the 1974 Plan asserts that this U.S. legislation applies to the Walter Canada Group even though they were all Canadian corporations or entities conducting their mining businesses only in Canada and not in the U.S.

[4] As far as I'm aware, and all counsel agree on this point, this is the first time that a Canadian court will have considered whether *ERISA* applies in Canada and in these circumstances. It also appears to be the case that no U.S. court has yet considered whether *ERISA* applies to entities outside of the U.S.

[5] The 1974 Plan's claim is extremely large - approximately $1.25 billion. If the 1974 Plan's claim is valid, it will swamp all other valid claims that have been filed in the estate against the Walter Canada Group. The result would be that the vast majority of the realizations from the estate assets - estimated by mid-2017 to be approximately $63 million - would be paid to the 1974 Plan and not in respect of the claims of other creditors. These other creditors include the Walter Canada Group's former employees, which in turn include union members represented by the United Steelworkers, Local 1-424 (the "Union"), to whom substantial amounts are owed.

II PROCEDURAL BACKGROUND

[6] The Claims Process Order that was granted on August 16, 2016 (see *Walter Energy Canada Holdings, Inc. (Re)*, 2016 BCSC 1746 at paras. 86-87) put in place a specific claims process designed to address the 1974 Plan's claim. Pursuant to the Claims Process Order, and with the objective of clarifying the issues as between the parties, the 1974 Plan filed a notice of civil claim on August 26, 2016 in this action. Responsive pleadings were filed by the Walter Canada Group and the Union shortly thereafter.

[7] Paragraph 30 of the Claims Process Order provided that, upon the filing of the pleadings, the 1974 Plan's claim was to be adjudicated by the Court "under a procedure to be determined more fully by subsequent Order of this Court".

[8] There were various disagreements between the Walter Canada Group, the Union and the 1974 Plan as to whether pre-hearing discovery procedures were required or necessary prior to a determination of certain preliminary issues raised by the Walter Canada Group. Since at least the fall of 2016, the 1974 Plan has taken the position that it is inappropriate to determine these preliminary issues on a summary basis without allowing it to conduct discovery of the Walter Canada Group.

[9] This disagreement led the Monitor to apply for directions on the procedure to adjudicate the 1974 Plan's claim, as was expressly directed under paragraph 31 of the Claims Process Order. I denied the oral and document discovery sought by the 1974 Plan arising from two hearings: firstly, on October 26, 2016 (*Walter Energy Canada Holdings, Inc. (Re)* (Unreported; October 26, 2016) and secondly, on November 28/December 2, 2016 (*Walter Energy Canada Holdings, Inc. (Re)*, 2016 BCSC 2470). Those decisions were made in light of the Walter Canada Group's position that the preliminary issues could be resolved on a summary basis, consistent with the legislative objective under the *CCAA* to determine claims in that manner.

[10] After the October 26, 2016 hearing, the parties agreed to a Case Plan Order which set out various deadlines for the delivery of the applications and responses, evidence and written arguments, all in advance of the January 2017 hearing.

[11] In November 2016, the Walter Canada Group filed their application for a summary hearing to decide these issues. Although described as a "summary hearing", the nature of the hearing can be described as a hybrid one. In addition to the pleadings, applications and responses, the evidence before the Court consisted of various affidavits, the Walter Canada Group's notice to admit and the 1974 Plan's response to the notice to admit. In addition, as the answer to one of the issues - namely, whether *ERISA* applies exterritorialy to the Walter Canada Group - is a matter of U.S. law, the Walter Canada Group and the 1974 Plan both filed expert reports from U.S. attorneys. All three of these experts were cross examined on their reports at this hearing.

III ISSUES

[12] The Walter Canada Group seeks the following declaratory relief:

a) under Canadian conflict of laws rules, the 1974 Plan's claim as against the Walter Canada Group is governed by Canadian substantive law and not U.S. substantive law (including *ERISA*);

b) in the alternative, if the 1974 Plan's claim against the Walter Canada Group is governed by U.S. substantive law (including *ERISA*), then as a matter of U.S. law, "controlled group" liability for withdrawal liability related to a multiemployer pension plan under *ERISA* does not extend extraterritorially; and

c) in the further alternative, if the 1974 Plan's claim against the Walter Canada Group is governed by U.S. substantive law (including *ERISA*), and *ERISA* applies extraterritorially, that law is unenforceable in Canada because it conflicts with Canadian public policy.

[13] It is common ground that if the Walter Canada Group succeeds on any one of the above arguments, the 1974 Plan's claim is not a valid claim against the estate. While I have referred to the arguments below as that of the Walter Canada Group, I have considered the similar arguments advanced by the Union even if they are not specifically referenced as such.

IV IS A SUMMARY HEARING APPROPRIATE?

[14] The 1974 Plan argues that the hearing should not proceed summarily and has brought a cross application to dismiss the Walter Canada Group's application. Consistent with Rule 9-7 of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009 (the "*Rules*") regarding summary trials, the 1974 Plan argues:

a) the matter is not suitable for a summary hearing: Rule 9-7(11)(b)(i);

b) a summary hearing on the preliminary issues will not assist in the efficient resolution of the validity of its claim: Rule 9-7(11)(b)(ii);

c) the Court will be unable to find the necessary facts to determine the issues: Rule 9-7(15)(a)(i);

d) the Court should find it unjust to determine the preliminary issues in the circumstances: Rule 9-7(15)(a)(ii); and

e) the Walter Canada Group is "litigating in slices" by attempting to obtain a decision on only some of the issues.

[15] The *CCAA* mandates that any dispute about claims will be determined, if possible, in a summary manner. Specifically, the *CCAA* provides for a summary determination of the validity of a disputed unsecured claim, such as that asserted here by the 1974 Plan:

> **Determination of amount of claims**
>
> 20 (1) For the purposes of this Act, the amount represented by a claim of any secured or unsecured creditor is to be determined as follows:
>
> (a) the amount of an unsecured claim is the amount
>
> ...
>
> (iii) in the case of any other company, proof of which might be made under the *Bankruptcy and Insolvency Act*, but if the amount so provable is not admitted by the company, the amount is to be determined by the court on summary application by the company or by the creditor;
>
> [Emphasis added]

[16] The requirement for a summary determination of claims in a *CCAA* proceeding is similar to that found in the *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3: see *San Juan Resources Inc. (Re)*, 2009 ABQB 55 at para. 30. Both recognize the need to determine claims as quickly as possible to allow for a timely distribution to creditors, as creditors will suffer more prejudice if there is delay in receipt of whatever recovery they can expect from an insolvent estate. In addition, proceeding by summary application respects the need to resolve claims without undue cost, which would exacerbate the already insolvent circumstances and lessen the recovery of the parties.

[17] Other than directing a "summary" determination of the issue, the *CCAA* provides no further guidance as to how a claim is to be determined. In this legislative vacuum, courts across Canada have drawn upon their statutory jurisdiction under the *CCAA* to fashion a process to do just that. This typically takes the form of a claims process order, as was granted in this proceeding on August 16, 2016.

[18] There was agreement that the process typically found in a claims process order, allowing for review by the monitor and a revision/disallowance process, was not appropriate in these circumstances. The 1974 Plan's claim raised unique issues and it was recognized early in these proceedings that a resolution of that claim would likely require a more complex procedure.

[19] There are examples where the courts in *CCAA* proceedings have fashioned a process that was "summary" in the sense of not requiring full pre-trial and trial procedures, but still allowed for certain appropriate pre-hearing steps.

[20] A similar issue was before the Court in the *CCAA* proceedings in *Pine Valley Mining Corporation (Re)*, 2008 BCSC 356. A substantial claim had been advanced and the Court addressed how the claim should be resolved and the format of the summary trial. Justice Garson (as she then was) said:

> [16] The second issue I have been asked to determine is the question of the format of this trial. Section 12 of the *CCAA* [now s. 20] requires a summary trial. I recognize that in some cases, courts have held that that does not preclude a conventional trial. (See *Algoma Steel Corporation v. Royal Bank of Canada* (1992), 8 O.R. (3d) 449 (C.A.). I do not understand Mr. McLean to object in principle to an order that this matter be determined in a summary way but, rather, I think he reserves his right to object to the suitability of such a procedure depending on how the evidence unfolds. It is my view that s.12 [now s. 20] of the *CCAA* informs any decision the court must make as to the format of a trial and that trial must surely be as the section dictates, a summary trial, unless to do otherwise would be unjust, or there is some other compelling reason against a summary trial. I am not persuaded that this claim cannot be tried summarily on the date reserved in May of this year. The parties have one week to work out an agreement as to a time line for the necessary steps to prepare for that trial, including the exchange of pleadings, disclosure of documents as requested by Tercon, agreed facts, delivery of affidavits, expert reports (including notice of reliance on all or part of the Monitor's reports), delivery and responses to notices to admit, examination for discovery if consented to, and delivery of written arguments. I acknowledge that many of these steps are underway.

> [17] ... Either party has leave to apply to cross-examine the deponent of an affidavit out of court or in court. Either party has leave to apply to convert this summary trial to a conventional trial but I expect the parties to make their best efforts to manage this generally as a summary trial.
>
> [Emphasis added]

[21] Similarly, in *Jameson House Properties Ltd. (Re)*, 2011 BCSC 965 at paras. 13-14, Justice Adair departed from the strict terms of a claims process order and ordered the filing of pleadings and oral discovery after the filing of affidavits. An agreed statement of facts was also later filed although some facts remained in dispute. At para. 15, the Court stated that it was approaching the summary hearing as in a conventional trial; in other words, if the party bearing the onus of proof failed to establish the necessary facts, that party's case would fail.

[22] In *Coast Capital Savings Credit Union v. The Symphony Development Corp.*, 2011 BCSC 333 at paras. 23-27, the Court referred to a "principled" approach to the determination of claims, albeit in a receivership context, which respected the summary claims process while also ensuring that the claim was adjudicated in a just manner.

[23] Accordingly, although the *CCAA* requires that, presumptively, claims be determined on a summary basis, the court has the discretion to order another procedure where it is appropriate. That other procedure may, but will not usually, involve a full trial procedure. One possible approach is to conduct a hybrid hearing, such as occurred here.

[24] Needless to say, the exercise of the court's discretion will be guided by the statutory objectives of the *CCAA* toward a timely and inexpensive resolution of claims and distribution to creditors, while also ensuring that the determination of claims is made in a manner that is just and fair to all the stakeholders, including the debtor company, the claimant and other creditors: *0487826 B.C. Ltd. (Re)*, 2012 BCSC 1501 at para. 38. These objectives are consistent with Rule 1-3(1) which states that the object of the *Rules* is to secure the "just, speedy and inexpensive determination of every proceeding on its merits". These objectives are also

consistent with the Supreme Court of Canada's recent exhortation to the legal profession and the courts to embrace more summary forms of adjudication where appropriate, as found in *Hryniak v. Mauldin*, 2014 SCC 7.

[25] In exercising the court's discretion to move beyond a pure summary determination in accordance with s. 20 of the *CCAA*, factors to be considered by the court will vary from case to case depending on the circumstances, but may include: the nature and complexity of the claim or issues arising; the amount in issue; the nature of the evidence (including whether credibility is in issue); the importance of the claim to the creditor and the estate; the cost and delay of further procedures; and what prejudice, if any, may arise from a summary hearing.

[26] There is no "one size fits all" solution as to how any claim can be determined; ideally, the answer will no doubt be driven by the willingness of the parties to streamline the process and the creativity of the parties, and their counsel, in fashioning an efficient and expeditious means of obtaining the necessary evidence to put before the court. If agreement can't be reached, then it will fall to the court to consider the issue.

[27] Procedural issues that may be considered include:

a) whether pre-trial oral or document discovery is truly necessary and if so, whether limits can be put on such discovery;

b) whether affidavits should be filed as opposed to *viva voce* evidence at a full trial;

c) whether cross-examinations on affidavits or expert reports are necessary and whether that can be done ahead of the hearing or at the hearing itself;

d) whether timelines for delivery of materials, such as affidavits, or any pre-hearing procedures, can be fixed so to expedite the determination of the issues;

e) whether other means of establishing the evidentiary record can be ordered, such as through notices to admit, agreed statement of facts and common documents so as to minimize or eliminate any conflict as to the facts; and

f) whether written arguments can be exchanged in advance of the hearing.

[28] The 1974 Plan continues to take the position that the issues raised in the Walter Canada Group's application cannot and should not be determined at this hearing without providing it the opportunity to undertake the discovery that it earlier sought. It specifically seeks to examine William G. Harvey, the former executive vice-president and chief financial officer of the Canadian holding company within the Walter Canada Group, who was also the person who gave evidence in support of the initial *CCAA* filing. That evidence was accepted by this Court and various orders were made based on that evidence.

[29] In substance, the 1974 Plan advocated for a reversal of what I consider to be the proper approach (and onus) here, as discussed above. The 1974 Plan submits that a full trial is required, unless the Walter Canada Group can successfully argue in favour of abbreviated procedures. Consistent with its goal of embarking upon a full scale litigation process, the 1974 Plan prepared its list of documents dated December 23, 2016. The Walter Canada Group has not yet provided any discovery, either oral or documentary.

[30] I intend to address the 1974 Plan's objection to the lack of discovery from the Walter Canada Group in the context of the individual issues discussed below. It will suffice at this point to note that I reject the approach advocated by the 1974 Plan, although I will consider its arguments in the context of the relevant and material evidence needed to decide the issues raised on this application.

V BACKGROUND FACTS

[31] In support of its overall position that this summary hearing is inappropriate, the 1974 Plan has steadfastly refused to admit to most facts as proposed by the

Walter Canada Group. It insists on what it calls "trial quality" evidence on all issues and says that there remain "disputed facts" which are relevant to the determination of these issues, principally relating to the degree of integration between the Walter Canada Group and the entities within the U.S. arm of the Walter Energy Group.

[32] The stridency of this position is particularly puzzling given the 1974 Plan's refusal to acknowledge even its own "facts" and documents, as found in its evidence filed in the course of this proceeding.

[33] The 1974 Plan has shown absolutely no willingness to consider and co-operate in the development of a streamlined process which would have allowed the Walter Canada Group to put what I consider uncontroversial facts before the court. The more extreme examples of this obdurate position are found in the 1974 Plan's refusal to admit that: the Canadian mine operations and assets in this jurisdiction were governed by Canadian and British Columbian environment and mining legislation; and, that the Walter Canada Group's relationship with its Canadian employees (both unionized and non-unionized) were governed by Canadian and British Columbian labour and employment laws. To suggest otherwise is a confounding proposition and needless to say, the 1974 Plan never did explain how it could not be so. The 1974 Plan would only admit that the mines were located in British Columbia and that the Walter Canada Group employed persons working in British Columbia, matters that were in evidence at the beginning of this proceeding and as I said, uncontroversial.

[34] The 1974 Plan has raised virtually every possible objection toward blocking a summary or even hybrid hearing on these preliminary issues, presumably toward the end game of avoiding this hearing and engaging in an extensive and expensive full-scale litigation process with corresponding discovery. In my view, the objections of the 1974 Plan can more accurately be described as angling for a "fishing expedition" so as to search for facts that may conceivably provide some basis for their claim.

[35] I would also note that the 1974 Plan appears to have made no effort to obtain what it describes as relevant evidence from various U.S. sources, including speaking

to Mr. Harvey and also obtaining documentation in the hands of the U.S. debtors within the Walter Energy Group: see *Tassone v. Cardinal*, 2014 BCCA 149 at paras. 38-39. As such, the 1974 Plan has not provided any foundation upon which to argue that further relevant facts may exist in order to prove its claim.

[36] I have concluded that the approach advocated by the 1974 Plan is neither warranted nor appropriate in the circumstances and I am exercising my discretion to proceed otherwise.

[37] Accordingly, I have taken the facts from various sources: the facts asserted by the 1974 Plan which are admitted or which are not contested by the Walter Canada Group or the Union for the purpose of this application; evidence filed by the 1974 Plan in these proceedings generally or in direct response to this application; and, what I consider to be the uncontroverted facts introduced by the Walter Canada Group in its evidence in this proceeding which have been the foundation for numerous orders granted by me. I also rely on the findings in my earlier reasons for judgment in these proceedings (including *Walter Energy Canada Holdings, Inc. (Re)*, 2016 BCSC 107; 2016 BCSC 1413; 2016 BCSC 1746); and, evidence introduced in other proceedings before this court and filed in this action. See *Petrelli v. Lindell Beach Holiday Resort Ltd.*, 2011 BCCA 367 at paras. 36-37; *British Columbia (Attorney General) v. Malik*, 2011 SCC 18 at paras. 46-48.

[38] In my view, there is little, if any, controversy about the following facts which are more accurately described as simply background facts.

[39] Below are my findings of fact. It will become clear from the analysis below that most of the following background facts only provide context for the specific determination of the issues raised by the Walter Canada Group. I will also address any further facts relevant to the analysis in the separate discussion of the issues.

(1) The Walter Energy Group and U.S. Operations

[40] The Walter Energy Group operated its international coal production and export business in two distinct segments: (a) the U.S. operations, and (b) the Canadian and United Kingdom (U.K.) operations.

[41] The parent corporation of all of entities within the Walter Energy Group is Walter Energy, Inc. ("Walter Energy U.S."), which is a public company incorporated under the laws of Delaware and headquartered in Birmingham, Alabama. The U.S. coal mining operations of the Walter Energy Group were conducted in Alabama and West Virginia through a variety of U.S. corporations.

[42] The Walter Energy Group's U.S. entities included a wholly owned subsidiary of Walter Energy U.S., Jim Walter Resources, Inc. ("Walter Resources"). Walter Resources was incorporated in Alabama and conducted its coal production business in Alabama.

(2) Acquisition leading to Creation of Walter Canada Group

[43] Before 2011, Walter Energy U.S. did not have any operations or subsidiaries in Canada or the U.K.

[44] In October 2010, Walter Energy U.S. and Western Coal Corp. ("Western") began negotiating the acquisition of Western's coal mining operations in British Columbia, the U.K. and the U.S. (the "Western Acquisition").

[45] Walter Energy U.S. publicly announced the Western Acquisition in November 2010, when Walter Energy U.S. issued a press release and filed both the press release and a Form 8-K with the SEC on its publicly available EDGAR system. The press release referred to Walter Energy U.S.'s intention to complete a "business combination" with Western.

[46] In December 2010, Walter Energy U.S. announced that (admitted for the purpose of these statements having only been made, and not for the truth of the contents):

a) it had entered into an arrangement agreement with Western whereby Walter Energy U.S. would acquire all of the outstanding common shares of Western;

b) the "transaction will be implemented by way of a court-approved plan of arrangement under British Columbia law"; and

c) in connection with the arrangement, Walter Energy U.S. intended to borrow $2.725 million of senior secured credit facilities, "the proceeds of which will be used (i) to fund the cash consideration for the transaction, (ii) to pay certain fees and expenses in connection with the transaction, (iii) to refinance all existing indebtedness of the Company and Western Coal and their respective subsidiaries and (iv) to provide for the ongoing working capital of [Walter Energy U.S.] and its subsidiaries".

[47] On March 9, 2011, Walter Energy U.S. incorporated Walter Energy Canada Holdings, Inc. ("Canada Holdings") and became its sole shareholder. Canada Holdings was incorporated specifically to hold the shares of Western and therefore, indirectly, its subsidiaries.

[48] On March 10, 2011, Justice McEwan of this Court approved the proposed plan of arrangement through which the Western Acquisition was accomplished.

[49] On April 1, 2011, Canada Holdings acquired all outstanding common shares of Western for an estimated total consideration of approximately US$3.7 billion.

[50] After completing the Western Acquisition, the Walter Energy Group engaged in a series of internal restructurings to rationalize operations and organize the Walter Energy Group into geographical business segments: the Walter U.S. group, the Walter Canada Group and the Walter U.K. Group. As a result, the U.S. assets previously held by Western were transferred from Canada Holdings to Walter Energy U.S. and no longer formed part of the Canadian assets.

(3) Walter Resources and the 1974 Plan

[51] The 1974 Plan is a pension plan and irrevocable trust established in 1974 in accordance with section 302(c)(5) of the *Labour Management Relations Act of 1947*, 29 U.S.C. § 186(c)(5). It is a multiemployer, defined benefit pension plan under section 3(2), (3), (35), (37)(A) of *ERISA*.

[52] The 1974 Plan is resident in Washington, D.C. and administered there. The trustees are resident in the U.S. and all participating employers in the 1974 Plan are resident in the U.S.

[53] The 1974 Plan was established pursuant to a collectively bargained National Bituminous Coal Wage Agreement of 1974 negotiated between the United Mine Workers of America and the Bituminous Coal Operators' Association, Inc., a multiemployer bargaining association. This agreement has been amended from time to time since 1974.

[54] *ERISA* requires that the 1974 Plan be administered in accordance with the most recently negotiated collective bargained agreement and other related documentation, such as the pension plan document and pension trust document. These documents set out, among other things, the contribution obligations of contributing employers to the 1974 Plan, which include:

a) monthly pension contributions for as long as there were operations covered by the 1974 Plan; and

b) a "withdrawal liability" accruing upon a partial or complete withdrawal from participation in the 1974 Plan.

[55] The participants and beneficiaries in the 1974 Plan are retired or disabled former hourly coal production employees and their eligible surviving spouses. There are approximately 88,000 such participants and beneficiaries.

[56] All signatories to the collective bargaining agreements are "participating employers". All such "participating employers" are resident in the U.S.

[57] Only one of the U.S. entities, namely Walter Resources (or a predecessor entity), was a signatory to various National Bituminous Coal Wage Agreements from 1978 forward and was therefore, a "participating employer" in the 1974 Plan. The last of such agreements signed by Walter Resources was the one negotiated in 2011 (the "2011 CBA").

[58] No member of the Walter Canada Group is or ever was a signatory to any National Bituminous Coal Wage Agreement, including the 2011 CBA. The 1974 Plan does not suggest that the Walter Canada Group ever contributed to the 1974 Plan; nor does the 1974 Plan suggest that the Walter Canada Group entities had any obligation to contribute to the 1974 Plan.

[59] At the time of the Western Acquisition in 2011, the 1974 Plan had an unfunded liability of more than US$4 billion. Its status at that time was said to be "Seriously Endangered Status", meaning that the 1974 Plan's funded percentage was less than 80%. If Walter Resources had withdrawn from the 1974 Plan around that time, the estimated withdrawal liability was approximately US$426 million. There is no indication that the 1974 Plan took any position in this court in respect of the Western Acquisition.

[60] Walter Resources and the 1974 Plan entered into the 2011 CBA after the Walter Acquisition was completed.

[61] As with many pension plans, the fortunes of the 1974 Plan (and hence its beneficiaries) have not escaped the brunt of global market forces over the last decade or so. The global financial crisis in 2008/2009 resulted in declining assets held by such plans. In addition, the demographics of an aging population combined with declining coal mining operations (and hence fewer participating employers) have resulted in added financial pressures on less resources. As of September 2015, the 1974 Plan was certified as being in "Critical and Declining Status", meaning that it is expected to become insolvent by 2025/2026. The 1974 Plan now asserts that the insolvency is expected to occur in six to seven years.

[62] Beyond benefits available to the beneficiaries of the 1974 Plan under these private contractual arrangements, there is some governmental support. A U.S. government sponsored entity, the Pension Benefits Guaranty Corporation, guarantees payment of a portion of the 1974 Plan's benefits, but at a reduced level.

(4) Walter Canada Group Corporate Structure

[63] All of the Walter Canada Group entities are organized in Canada and for the most part, in British Columbia. The Canadian business operations principally consisted of the operation of three coal mines in British Columbia, being the Brule, Willow Creek and Wolverine mines. These mining properties have since been sold to a purchaser, as approved in these proceedings last year: *Walter Energy Canada Holdings, Inc. (Re)*, 2016 BCSC 1746 at para. 80.

[64] In particular, the petitioner companies, being Walter Canadian Coal ULC and Canada Holdings, with the latter's wholly owned subsidiary corporations, being Wolverine Coal ULC, Brule Coal ULC, Willow Creek Coal ULC, Cambrian Energybuild Holdings ULC (which in turn owns the Walter Energy Group's U.K. assets) and 0541237 BC Ltd., are all incorporated under the laws of British Columbia. The lone exception is Pine Valley Coal Ltd., a company incorporated under the laws of Alberta.

[65] Similarly, the partnerships in the Walter Canada Group, which are wholly owned by Canada Holdings, being Walter Canadian Coal Partnership, Wolverine Coal Partnership, Brule Coal Partnership, and Willow Creek Coal Partnership, are all organized under the laws of British Columbia.

[66] As I earlier noted in my reasons (*Walter Energy Canada Holdings, Inc. (Re)*, 2016 BCSC 107 at para. 4), "[t]he timing of the Canadian acquisition could not have been worse". In 2011, the market for metallurgical coal fell dramatically, affecting operations of the entire Walter Energy Group in the U.S., Canada and the U.K. One can only assume that other coal producers in those jurisdictions, including signatories to the 1974 Plan in the U.S., similarly suffered the same fate and are struggling or have struggled with this economic downturn in the coal industry.

(5) The U.S. Chapter 11 Proceedings

[67] On July 15, 2015, Walter Energy U.S. and some or all of its U.S. subsidiaries, including Walter Resources, commenced proceedings under Chapter 11 of Title 11 of the U.S. *Bankruptcy Code* in the U.S. Bankruptcy Court for the Northern District of Alabama (the "Chapter 11 Proceedings").

[68] On October 8, 2015, the 1974 Plan filed proofs of claim in the Chapter 11 Proceedings against all of the U.S. debtors, including Walter Resources and Walter Energy U.S., claiming what was anticipated to be the withdrawal liability of Walter Resources if it withdrew from the 1974 Plan. It appears to be the case that everyone anticipated that Walter Resources would seek to withdraw from the 1974 Plan through the Chapter 11 Proceedings. The unsecured claim was for not less than approximately US$904 million.

[69] The Proofs of Claim filed by the 1974 Plan do not refer to any entity within the Walter Canada Group as having any potential liability for this claim.

[70] The U.S. insolvency filing in turn sparked the need for the corporations within the Walter Canada Group to seek creditor protection in Canada.

[71] On December 7, 2015, this Court granted an Initial Order in this proceeding in favour of the petitioners. Protection was also granted in favour of the partnerships (see *Walter Energy Canada Holdings, Inc. (Re)*, 2016 BCSC 107 at para. 3). The Walter Canada Group did not seek recognition of the *CCAA* Proceedings in the U.S.; similarly, the Walter Energy Group's U.S. debtors did not seek recognition of the Chapter 11 Proceedings in Canada.

[72] At the time of the Canadian *CCAA* filing, Mr. Harvey indicated that efforts were underway in the Chapter 11 Proceedings to implement a sales process to sell all of Walter Energy U.S.'s Alabama assets. A stalking horse agreement was part of that sales process, as is typical in those proceedings.

[73] It quickly became apparent to the U.S. stakeholders that the stalking horse purchaser in the Chapter 11 Proceedings had no interest in assuming what the U.S. Bankruptcy Court would later describe as Walter Resources' "legacy and current labour costs", including that owing under the 2011 CBA. The asset purchase agreement later signed by the U.S. debtors and the purchaser expressly provided that the sale was subject to the U.S. Bankruptcy Court issuing an order allowing the U.S. debtors to reject the 2011 CBA, in accordance with the U.S. *Bankruptcy Code* provisions. It is common ground that upon such rejection, the withdrawal liability under the 1974 Plan would arise.

[74] Arising from opposition to the stalking horse process from some factions, including the unsecured creditors committee (the "UCC"), a settlement was reached. On December 22, 2015, the U.S. Bankruptcy Court entered an order approving a Settlement Term Sheet between the Walter Energy group's U.S. debtors, a steering committee, the stalking horse purchaser and the UCC. The Settlement Term Sheet entitles unsecured creditors, which includes the 1974 Plan, to receive 1% of the common equity issued in the stalking horse purchaser on closing, as well as the right to participate in any exit financing. Later documentation filed in March 2016 by the Walter Energy Group's U.S. debtors and the UCC in the Chapter 11 Proceedings confirms that this settlement was intended to establish the extent of any recovery by unsecured creditors, such as the 1974 Plan, from the Chapter 11 estates.

[75] The Walter Canada Group entities were not involved in the Chapter 11 Proceedings and were not parties to the Settlement Term Sheet.

[76] On December 28, 2015, the U.S. Bankruptcy Court granted an order allowing Walter Resources to reject the 2011 CBA, over the objections of labour related stakeholders, including the 1974 Plan. The order (the "1113/1114 Order") authorized Walter Energy U.S. and its U.S. affiliates to reject the 2011 CBA and declared that any sale to the stalking horse purchaser was free and clear or any encumbrance or liabilities under the 2011 CBA. The U.S. Bankruptcy Court also declared that upon

such sale, Walter Resources had no further contribution obligations under the 2011 CBA.

[77] The Walter Canada Group did not participate in the hearing which gave rise to the 1113/1114 Order. The reasons of the U.S. Bankruptcy Court which led to the granting of the 1113/1114 Order do not refer at all to the Walter Canada Group entities or any assets or operations in Canada held by those entities.

[78] The 1974 Plan appealed the 1113/1114 Order, although that appeal was later withdrawn in February 2016. At that time, the 1113/1114 Order became final.

[79] By early January 2016, the 1974 Plan clearly anticipated that Walter Resources' withdrawal from the 2011 CBA was imminent. Around that time, the 1974 Plan began filing materials in these *CCAA* proceedings asserting that the Walter Canada Group entities were jointly and severally liable for the withdrawal liability under the 1974 Plan.

[80] The sale of the U.S. assets, as approved by the U.S. Bankruptcy Court, closed on April 1, 2016. Accordingly, immediately before that date, all contributions by Walter Resources to the 1974 Plan ceased and the withdrawal liability arose. The 1974 Plan now estimates that the withdrawal liability is in excess of US$933 million.

[81] The 1974 Plan introduced the evidence of Dale Stover, the Director of Finance and General Services employed with the 1974 Plan. He indicates that by reason of Walter Resources' withdrawal, the status of the 1974 Plan has been further jeopardized even beyond that recognized in September 2015. He indicates that the other employers in the 1974 Plan will be further burdened by this loss.

[82] Despite the extensive proceedings before the U.S. Bankruptcy Court, at no time has that Court expressed any opinion on the validity of the 1974 Plan's claim as asserted in the Chapter 11 Proceedings. In addition, at no time did the U.S. Bankruptcy Court address the ability of the 1974 Plan to assert joint and several liability for the withdrawal liability against the other U.S. debtors. Certainly, that court did not address the core (and second) issue before me on this application; namely,

whether the entities within the Walter Canada Group are liable under *ERISA's* provisions.

(6) Estimated Recoveries

[83] In my view, the evidence and submissions on this point are substantially irrelevant, and completely irrelevant to the determination of some issues. I understand that the parties all agree as to this irrelevancy although they also all saw fit to ensure that I knew the consequences of a win/loss to each side. Accordingly, to round out the narrative, the consequences arising from this application are as follows.

[84] If the 1974 Plan's claim is found to be invalid as against the Walter Canada Group entities, it is anticipated that all other unsecured claims filed against the Canadian estates will be paid in full, including in relation to substantial amounts (approximately $12.8 million) owed to the Canadian unionized employees who worked in the British Columbia coal mines. In that event, it is also expected that the remaining funds will likely flow to Walter Energy U.S. arising from intercompany claims that have been filed.

[85] I am advised by the 1974 Plan that, if this happens, no funds will be paid to it in respect of its unsecured claim. This appears to arise from the Settlement Term Sheet, discussed above, and which appears to limit recovery for the U.S. unsecured creditors (including the 1974 Plan) to equity in the stalking horse purchaser and participation in exit financing, which I gather provided little or no recovery in the U.S. Accordingly, the 1974 Plan asserts that without recovery from the Walter Canada Group's assets, it will fail to have achieved any recovery, either here in Canada or in the U.S.

VI *ERISA's* PROVISIONS

[86] A review of the legislative provisions found in *ERISA* is helpful at this point. It is certainly required in order to consider and decide the second question, namely whether the Walter Canada Group is liable under *ERISA* as a matter of U.S. law.

However, an understanding of those provisions is also necessary in order to answer the first question, namely being whether U.S. law (i.e. *ERISA*) even applies here.

[87] The following, which I have largely adopted from the expert report of one of the Walter Canada Group's expert on U.S. law, Marc Abrams, summarizes the relevant legislative provisions under *ERISA* (or Title 29). Some of these provisions have already been generally described above:

a) a "multiemployer plan" is a collectively bargained pension plan maintained and funded by more than one unrelated employer, typically within the same or related industries: 29 U.S.C. § 1301(a)(3). As stated above, the 1974 Plan is a multiemployer defined benefit pension plan: see 29 U.S.C. § 1002(2), (3), (35) and (37)(A);

b) if one of the contributing employers withdraws from a multiemployer plan, either partially or completely, *ERISA* requires the "employer" to pay to the plan its share of any unfunded vested benefits, generally determined as of the end of the plan year preceding the plan year in which the withdrawal occurs: 29 U.S.C. § 1386 and § 1391. The withdrawing employer's liability is referred to as the "withdrawal liability": 29 U.S.C. § 1381; and

c) the plan sponsor has a statutory duty to calculate and collect the withdrawal liability from the withdrawing employer: 29 U.S.C. § 1382. *ERISA* appears to contemplate that payments may be made over time in accordance with a schedule; however, if the withdrawing employer defaults in paying the withdrawal liability, the entire amount of the withdrawal liability becomes subject to collection: 29 U.S.C. § 1399(c)(5).

[88] The key *ERISA* provisions which are said by the 1974 Plan to give rise to its claim against the Walter Canada Group entities are:

a) withdrawal liability is the joint and several obligation of not only the withdrawing "employer" (as a contributing employer) but also each member of the employer's "controlled group": 29 U.S.C. § 1301(a)(2)(B);

b) a contributing sponsor's "controlled group" consists of the contributing employer and others who are under "common control" (29 U.S.C. § 1301(a)(14)(A) and 29 U.S.C. § 1002(40)(B));

c) for a determination as to whether two persons are under "common control" where there is a single-employer plan, *ERISA* then refers to regulations "consistent and coextensive" with regulations under section 414 of Title 26 (also known as the *Internal Revenue Code*): 29 U.S.C. § 1301(a)(14)(B);

d) with respect to multiemployer plans, two or more trades or businesses are deemed to be a single employer if they are within the same "control group" and "control group" means a group of trades or businesses under "common control" with the employer: 29 U.S.C. § 1002(40)(B); and

e) for the purposes of *ERISA*, the three principal types of "controlled groups" are found in *Internal Revenue Code* regulations: (i) parent-subsidiary controlled groups; (ii) brother-sister controlled groups; and (iii) combined groups: 26 C.F.R. § 1.1563-1(a)(1)(i).

[89] The 1974 Plan asserts that the corporations within the Walter Canada Group are part of Walter Resources' parent-subsidiary "controlled group". Under *ERISA*, a parent-subsidiary "controlled group" is a group consisting of entities connected through a controlling interest with a common parent where stock ownership of at least 80% of the voting power or value (other than the parent) is owned by one or more corporations and the common parent corporation owns stock with at least 80% of the voting power of at least one of the corporations: 29 U.S.C. § 1301(b)(1); 26 U.S.C. § 414(b); 26 U.S.C. § 1563(a)(1); 26 C.F.R. § 1.1414(c).

[90] The 1974 Plan also relies on other provisions of the *Internal Revenue Code* and its regulations which refers to treating partnerships which are under common control as a single employer: 26 U.S.C. § 414(c); 29 U.S.C. § 1301(b)(1); 26 U.S.C. § 1563(a)(1); 26 C.F.R. § 1.1414(c)-2.

[91] For purposes of this application, the Walter Canada Group and the Union agree that it can be assumed that under the above provisions, the Walter Canada Group entities were under common control and within the "controlled group" of the Walter Energy Group given the level of stock ownership held by Walter Energy U.S. in Canada Holdings and Walter Canadian Coal ULC. Further, as stated above, 100% ownership of all of the Canadian operating entities is held through Canada Holdings. All of the expert witnesses were similarly asked to make this assumption.

[92] Accordingly, *prima facie*, *ERISA* purports to impose joint and several absolute liability on the entities within the Walter Canada Group based on the 1974 Plan having met the numerical (80%) test for stock ownership or voting control with respect to a "controlled group" under *ERISA*. In addition, no issue arises given that some of the entities are partnerships.

VII THE CHOICE OF LAW QUESTION

[93] The first issue posed by the Walter Canada Group is:

> Under Canadian conflict of laws rules, is the 1974 Plan's claim as against the Walter Canada Group governed by Canadian substantive law or U.S. substantive law (including *ERISA*)?

[94] Accordingly, the question for this Court to consider is what choice of law - Canada or the U.S. (ie. *ERISA*) - governs the 1974 Plan's claim. Since the 1974 Plan has chosen to assert its claim in these Canadian proceedings, it is common ground that Canadian choice of law principles govern the analysis of what law applies to the 1974 Plan's claim: Janet Walker, *Castel & Walker Canadian Conflicts of Laws*, (Toronto, LexisNexis, 2005) (loose-leaf, 6th ed.) ch. 1 at 1-2.

[95] The overall aim or purpose of the choice of law exercise is to identify the most appropriate law to govern a particular issue: A.V. Dicey, J.H.C. Morris & Lawrence Collins, *The Conflict of Laws,* vol. 1, 15th ed. (London, Sweet & Maxwell, 2012) at 51.

[96] The authorities are clear that determining choice of law is a two-step process: firstly, the Court characterizes the claim to determine which choice of law rule

applies; and secondly, the Court applies the proper choice of law rule to the claim. This process was described in *Castel & Walker* at 3-1 as follows:

> In an action involving legally relevant foreign elements, a court may be asked to apply foreign law. To decide whether to do so, the court must ascertain the legal nature of the questions or issues that require adjudication and then apply its appropriate conflict of laws rules to them. For instance, do the facts raise a question of succession or of matrimonial property, or a question of capacity or of form? This analytical process is called the characterization or classification. Its purpose is to enable the court to find legal categories with which the forum is familiar. In other words, the court must allocate each question or issue to the appropriate legal category. The application of the forum's conflict of laws rule to each legal question or issue will indicate which legal system governs that question or issue. That legal system is called the *lex causae*.
>
> Once the court has characterized the issue, it will consider the connecting factor – a fact or element connecting a legal question or issue with a particular legal system. Finally, the court will apply the law identified as the governing law. In doing so it must separate the rules of substance from the rules of procedure of the legal systems involved, because questions of procedure are governed by the *lex fori*.

[97] The first step therefore requires that the court ascertain or characterize the "legal nature of the questions or issues". Typical legal categories used for characterization include: property law, the law of obligations, family law, the law of corporations and insolvency. Other categories, or sub-categories, include the law of contract (an "obligation"), tort and equitable remedies, such as unjust enrichment.

[98] In Stephen G.A. Pitel and Nicholas S. Rafferty, *Conflict of Laws*, 2nd ed. (Toronto: Irwin Law Inc., 2016) at 223-226, the authors discuss the somewhat perplexing question as to just what is to be characterized. They conclude that facts are not to be characterized, but the courts have variously referred to both "issues" and "causes of action" as being characterized. At 224, the authors highlight, citing *Macmillan Inc. v. Bishopsgate Investment Trust and Others (No. 3)*, [1996] 1 W.L.R. 387 (C.A.), the possible differences that may arise in that respect and that claimants may attempt to characterize their claims to support their choice of law.

[99] In this case, I see no material difference whether one characterizes the 1974 Plan's claim in terms of a "cause of action" or "issue". Fundamentally, the claim arises from the express legislative provisions of *ERISA*. As noted by the Walter

Canada Group, there is no equivalent provision of *ERISA* here in Canada or British Columbia. In that event, the claim is to be characterized "as its closest functional equivalent under that [forum's] law", namely Canada and British Columbia: Pitel and Rafferty at 227.

[100] The Walter Canada Group and the Union, on one hand, and the 1974 Plan, on the other, present starkly different approaches to the characterization of the 1974 Plan's claim. As I will describe below, the answer to this first step or question in turn leads to a distinct path or set of considerations as to the choice of law issue. The answers to each of the analytical steps also lead to different considerations in relation to most, if not all, of the evidentiary issues and objections raised by the 1974 Plan.

[101] Accordingly, the statement found in Pitel and Rafferty at 222 that the characterization of the issue is "central to the choice of law process" is particularly apt here.

[102] This two-step process is illustrated by this Court's decision in *Minera Aquiline Argentina SA v. IMA Exploration Inc.*, 2006 BCSC 1102, aff'd 2007 BCCA 319, upon which both parties rely. At paras. 160-181, this Court addressed the characterization issue, which arose from the competing positions of the parties. The defendant asserted that the claim related to a foreign immovable (in which case Argentina law applied) and the plaintiff asserted that the claim was an *in personam* claim for appropriation through a breach of confidence (in which case British Columbia law applied).

[103] This Court in *Minera* determined that the claim was more appropriately characterized as an equitable claim for unjust enrichment arising from a breach of confidence, with the consequence that the relevant choice of law rule was the "proper law of the obligation" (see paras. 181-184).

(1) What is the Characterization of the 1974 Plan's Claim?

[104] Turning to the first step, there is no disagreement that the 1974 Plan's claim does not arise as a result of the Walter Canada Group's conduct. The Walter

Canada Group entities did not employ any beneficiaries of the 1974 Plan or have any direct relationship, contractual or otherwise, with the 1974 Plan. Nor did the Walter Canada Group contribute to or have any obligation to contribute to the 1974 Plan. No other conduct that may be relevant to the Walter Canada Group's liability in that regard has been raised. Simply put, the Walter Canada Group had nothing to do with either the 1974 Plan or Walter Resources' participation in it.

[105] The Walter Canada Group contends that the 1974 Plan's claim is properly characterized as an issue under the law of corporations or as an issue of legal corporate or partnership status or personality. They say that the basis for the claim simply arises under *ERISA* and as a result of Walter Resources' withdrawal from the 1974 Plan. Further, they say that the *only* basis for the claim against the Walter Canada Group arises from *ERISA*'s "common control" provisions, discussed above, and are said to apply solely from the fact that the Walter Canada Group entities and Walter Resources are both owned directly or indirectly by Walter Energy U.S.

[106] It is clear that Walter Resources was the only signatory to the 2011 CBA and that Walter Resources' corporate relationship, *albeit* indirectly, to the Walter Canada Group, is the sole basis upon which the 1974 Plan seeks to apply the "controlled group" concept under *ERISA*.

[107] The 1974 Plan contends that its claim concerns the law of obligations and in particular, contract, such that U.S. law is the "proper law of the obligation". The 1974 Plan asserts that its claim is one based not only on *ERISA*, but also the documents by which the 1974 Plan administers itself: namely, the pension plan document, the pension trust document and the 2011 CBA.

[108] I will first address the arguments of the 1974 Plan.

[109] The arguments of the 1974 Plan rest on the central proposition that where a statute confers a right of action in favour of an entity which is not a party to a contract to which the claim relates, the "essential nature" of the claim is to enforce the terms of that contract, such that the claim is properly characterized as one in

contract. The 1974 Plan describes its claim as seeking to enforce the contractual obligations of Walter Resources against the Walter Canada Group. Three English insurance cases are cited in support.

[110] The court in *Youell v. Kara Mara Shipping Company Ltd.,* [2000] EWHC 220 was addressing the consequences of a collision at sea between two ships. The owners of the "innocent" vessel commenced proceedings in Louisiana. In that jurisdiction, such a party was allowed, by statute, to claim directly against the "at fault" vessel owner's insurers. The insurers ultimately applied in England to restrain these proceedings on the basis that the "direct action" statutory claim was pursuant to insurance policies which required any litigation to be brought in England. The English court agreed, stating:

> 58. The position in the present case is that World Tanker has asserted a claim on the H&M Policies by virtue of the *Direct Action Statute* in the Direct Action Claim. It is true that World Tanker have not become a party to the policies by a mechanism of statutory novation or of statutory assignment. But in my view, the nature of the rights that the *Direct Action Statute* confers to World Tanker is contractual; it confers a statutory right to make a claim on a contract to which World Tanker was not originally a party. ... the rights are confined to the "*terms and limits of the policy*".
>
> ...
>
> 61. Therefore, I conclude that the nature of the claim by World Tanker against YM Insurers in the Direct Action Claim is contractual and the terms of that contract would include the English proper law clause and the [exclusive jurisdiction clause].

[111] In *Through Transport Mutual Assurance Association (Eurasia) Limited v. New India Assurance Association Company Limited*, [2004] EWCA Civ 1598, the court was considering Finnish legislation that gave a person a direct right to sue the defendants' insurer for losses caused by the defendant. At para. 56, the court agreed with the trial judge's approach to consider the "substance" of the claim being advanced. At para. 57, the court adopted the trial judge's comments on the characterization issue for choice of law purposes:

> ... If in substance the claim is independent of the contract of insurance and arises under the Finnish legislation simply as a result of its having a right of action against an insolvent insured, the issue would have to be characterized as one of statutory entitlement to which there may be no direct equivalent in

> English law. In that case the issue would in my view have to be determined in accordance with Finnish law. If, on the other hand, the claim is in substance one to enforce against the insurer the contract made by the insolvent insured, the issue is to be characterized as one of obligation. In that case the court will resolve it by applying English law because the proper law of the contract creating the obligation is English law.

[112] The Court of Appeal in *Through Transport* agreed with the lower court's conclusions that the claim was, in substance, to enforce the insurance contract between the responsible party and its insurer:

> 58. ... In short, the title to section 67 [of the Finnish Act] is the "*insured person's entitlement to compensation under general liability insurance*" and the right is defined as a right "to claim compensation in accordance with the insurance contract direct from the insurer" in certain defined circumstances. The claim under the Act is not therefore in any sense independent of the contract of insurance but under or in accordance with it. In these circumstances it seems to us that the judge was correct to hold that the issue under the Act is one of obligation under the contract. The judge noted in passing ... that the Finnish court itself described the Act as giving the injured party the right to claim compensation "according to the insurance policy".
>
> [Emphasis added]

The Court of Appeal also noted at para. 59 that, although the Finnish Act gave the claimant a right of action directly against the insurer without the need of a formal assignment, what he obtained was "essentially a right to enforce the contract in accordance with its terms". Therefore, pursuant to the terms of the insurance contract, that stated English law applied, English law was the proper law of the claim.

[113] The third and final case cited by the 1974 Plan is *The London Steam-Ship Owners' Mutual Insurance Association Ltd. v. The Kingdom of Spain, The French State*, [2013] EWHC 3188 (Comm). There, the court followed the analysis in both *Youell* and *Through Transport,* stating that in deciding whether or not a direct action right under a statute is "in substance" a claim to enforce the contract or a claim to enforce an independent right of recovery, what matters most is the content of the right, rather than the derivation of its content (paras. 82-88). The Court held that the essential content of the right was provided by the insurance contract, despite the Spanish law which also created further liability for an event that would not normally

be insurable. The direct action right conferred by Spanish law against the liability insurers was found to be, in substance, a right to enforce the contract rather than an independent right of recovery.

[114] The 1974 Plan argues that, for choice of law purposes, its claim arises under the law of obligations - namely it is one of contract. It argues that the three English cases above all involve: (a) a plaintiff advancing a claim against another party for a liability arising under a contract where there was no privity of contract; (b) a plaintiff claiming that the defendant's liability arose under a statute from a law other than the *lex fori*; and (c) a court characterizing the claim as a right to enforce a contract which only existed by reference to that contract.

[115] The 1974 Plan contends that its claim is the same because, although Walter Resources was the only signatory to the 2011 CBA, *ERISA* (namely the foreign law) provides that the Walter Canada Group is liable in relation to Walter Resources' rejection of 2011 CBA and the withdrawal liability that arose under that contract.

[116] Despite the 1974 Plan's fervent submissions on this issue, I am not convinced that the three English cases are analogous to the situation here. In my view, they are distinguishable.

[117] Firstly, the foreign statutes in the English cases simply authorized a direct action against a *party* to the contract in question, being the insurance policy. In essence, the plaintiffs were made parties to the insurance contract between the insurer and the insured. In contrast here, *ERISA* does not authorize the 1974 Plan to sue the Walter Canada Group as a party to the 2011 CBA, the pension plan and trust documents. The 1974 Plan relies solely on the provisions in *ERISA* which only references the contractual liability as the basis upon which to monetarily determine the amount of the liability.

[118] Secondly, the reasoning of and results in the English courts was substantially influenced by the fact that even though the plaintiffs were essentially to step into the insurance contracts, the terms of the contract were, by the statutory provisions, still

to govern. This meant that the plaintiffs took the insurance contracts as they found them and were subject to not only the benefits under the contracts, but also other provisions (or burdens) that might, for example, deny or limit coverage and therefore, recovery. As shown in the results found in those cases, that meant that the plaintiffs were subject to exclusive jurisdiction clauses and provisions requiring arbitration, which was the bargain struck in the insurance contracts.

[119] In *Through Transport*, the court stated at para. 58 that the claim was not "independent of the contract of insurance but under or in accordance with it."

[120] Here, *ERISA*'s provisions are entirely devoid of any mention of the underlying contractual obligations of Walter Resources. Those provisions simply provide that if there is a "withdrawal liability", the other members of the "controlled group" are liable for that amount. I see no basis upon which one could say that, in substance, the Walter Canada Group became a party to the 2011 CBA and the other pension documents by reason of *ERISA*'s provisions.

[121] For example, there is no suggestion that the other "controlled group" members could contest the amount of the withdrawal liability or advance any other substantive issues that Walter Resources might have raised under the terms of the 2011 CBA and the related documents. The evidence shows that the Walter Canada Group was not even notified of, let alone allowed to participate, in the contractual process by which the 1974 Plan determined the "withdrawal liability" under the 2011 CBA. The discussion of "absolute liability" of "controlled group" liability under *ERISA*, cited by the Union, found in *Connors v. Peles*, 724 F. Supp. 1538 (W.D. Pa. 1989) at 1577-8, is instructive on this point:

> ... Under certain circumstances, one member of a controlled group may be responsible for the withdrawal liability of another member of the controlled group. These principles apply only when there are two or more separate businesses that are banded or associated together in a "controlled group". Participation in the controlled group, by itself, imposes equal responsibility upon all members of the controlled group for the withdrawal liability of an "employer" member of the controlled group, i.e., even though the "employer" member of a group of trades or businesses is the only one with a pension plan. Once notice to the "employer" is given, as required by 29 U.S.C. § 1399, it is totally irrelevant as to whether actual or even constructive notice is

> given or imputed to the "non-employer" members of a controlled group. The liability of the "non-employer" members of a controlled group does not rest on any notice safeguards under ERISA. The "non-employer" members of the controlled group do not even have to be engaged in the same business enterprise, or even in a similar business. A striking example is provided in *Pension Benefit Guaranty Corp. v. Ouimet Corp.*, 630 F.2d 4, 11-13 (1st Cir.1980), where one member of a controlled group (the "non-employer") did not even have any employees!
>
> Congress built the equivalent of withdrawal liability "guaranty's" into ERISA, at the time of the enactment of the multiemployer amendments. The "guaranty's", commonly known and referred to as the "controlled group" statutes, 29 U.S.C. § 1301(b)(1), and the regulations adopted thereunder, 29 C.F.R. Part 2612, and consider the entire group as but one "employer", 29 U.S.C. § 1002(5), and impose *absolute* liability upon all members of a control group for the withdrawal liability of any member of a statutory group of enterprises, even though the "employer" member of a group of trades or business is the only one with a pension plan, and regardless of whether their groups have employees. *Pension Benefit Guaranty Corp. v. Ouimet Corporation*, 630 F.2d 4 (1st Cir.1980). Under "controlled group" statutory liability, an inquiry as to the interrelationship of the members of the control group, with the employees of all members of the control group, as required under the "single employer" test, is totally unnecessary and irrelevant.
>
> [Emphasis added in underlining]

[122] During the hearing, the 1974 Plan's counsel referred to the 1974 Plan as having certain "contractual expectations". While this may have been true in relation to Walter Resources, in my view, the 1974 Plan could only have had "statutory expectations" in relation to other "controlled group" members in the Walter Energy Group arising from *ERISA*. Certainly, the Walter Canada Group had no "contractual expectations" in these circumstances; this is in contradistinction to the fact that the insurers in the English cases most certainly would have had "contractual expectations" arising from the insurance contracts they issued.

[123] I turn to consider the argument advanced by the Walter Canada Group that the appropriate choice of law characterization of the 1974 Plan's claim is one of the law of corporations and more specifically, one of separate legal existence or personality.

[124] The 1974 Plan argues that the choice of law rule advocated by the Walter Canada Group is intended only for matters related to corporate existence, such as

whether an entity has the capacity to sue or be sued. The 1974 Plan concedes that it may also apply to issues of corporate governance, such as shareholder rights, the authority of directors, the power to make contracts or rights to issue or transfer shares.

[125] I do not agree that such a narrow approach as advocated by the 1974 Plan is appropriate in characterizing the issue. The references in the cases to looking at the "substance" of the claim support a more far-ranging and holistic analysis. Indeed, although in support of its own argument, the 1974 Plan itself asserted that the characterization exercise is to be done in accordance with the rules and in a "flexible manner".

[126] In *Macmillan*, the English court of appeal was called upon to settle a dispute about shares that were wrongly offered as security in England, when in fact they were owned by an American company. In the choice of law analysis, Auld L.J., at 407, discussed the need to look beyond the strict or narrow formulation of the claim:

> ...classification is governed by the *lex fori*. But characterisation or classification of what? It follows from what I have said that the proper approach is to look beyond the formulation of the claim and to identify according to the *lex fori* the true issue or issues thrown up by the claim and defence. This requires a parallel exercise in classification of the relevant rule of law. However, classification of an issue and rule of law for this purpose, the underlying principle of which is to strive for comity between competing legal systems, should not be constrained by particular notions or distinctions of the domestic law of the *lex fori*, or that of the competing system of law, which may have no counterpart in the other's system. Nor should the issue be defined too narrowly so that it attracts a particular domestic rule under the *lex fori* which may not be applicable under the other system: see *Cheshire & North's Private International Law*, 12th ed., pp. 45-46, and *Dicey & Morris*, vol. 1, pp. 38-43, 45-48.

Here, the "true issues" that are raised by the claim go well beyond the narrow formulation advanced by the 1974 Plan.

[127] Further, the text authority cited by the 1974 Plan on this issue in fact supports the position of the Walter Canada Group. In *Castel & Walker*, the authors also adopt a wider view of the "law of corporations" as including questions of status, separate

legal personality and the limited liability that flows from that personality. At 30-1, the authors state:

> Questions concerning the status of a foreign corporation, especially whether it possesses the attributes of legal personality, are, on the analogy of natural persons, governed by the law of the domicile of the corporation. This domicile is in the state, province or territory of incorporation or organization and it cannot be changed during the corporation's existence even if the corporation carries on business elsewhere.
>
> ...
>
> While the state, province or territory in which the foreign corporation intends to carry on business has the right to prescribe the extent to which the corporation may exercise its corporate powers and capacity, this does not mean that proceedings may be taken in this jurisdiction to affect its status as a corporation. ...
>
> There is some controversy over which law determines the liability of a corporation for the obligations of a foreign subsidiary. Since the personality and status of the subsidiary is called into question, it would seem that the law applicable to the status and capacity of the subsidiary should determine whether its corporate veil can be pierced.
>
> [Emphasis added]

[128] The 1974 Plan also argues that this Court should consider the rationale of the choice of law rule it is applying and also the purposes of the substantive law to be characterized and then determine if the conflict rule covers the substantive law at issue (ie. the effect of a certain characterization): Dicey at 51 citing *Raiffeisen Zentralbank Osterreich AG v. An Feng Steel Co. Ltd.*, [2001] EWCA Civ 68 at para. 27. The 1974 Plan then says that the purpose of the substantive law (ie. *ERISA*) is to ensure that employees who are promised retirement benefits actually receive those benefits, citing *Connolly v. Pension Benefit Guaranty Corp.*, 475 US 211, 214 (1986). The 1974 Plan then asserts that this purpose is entirely different than that behind the corporate choice of law rule whose purpose is the determination of corporate matters or more specifically, corporate capacity or governance. After analyzing the underlying policy purposes of the conflicts rule, that corporations are governed by the substantive law of the country of incorporation, the 1974 Plan argues that this substantive law issue is not engaged here since its claim is about employees' pension entitlements, in which case U.S. law should apply.

[129] This argument is entirely without merit in that it confuses the intent or purpose behind the "controlled group" provisions found in *ERISA* with the effect of those provisions. I agree that *ERISA* has been employed by the U.S. Congress with the *intention* and *purpose* of seeking to ensure that U.S. retirees receive contracted for benefits; however, the *effect* of the "controlled group" provisions is to collapse the corporate structure to ensure that as many entities within a corporate group are liable for retirement plan withdrawal and that their assets are available to meet obligations to those retirees.

[130] Seen in that vein, the purpose of the choice of law rule proposed by the Walter Canada Group intersects with the substantive law under *ERISA*, in that both address the corporate status or the separate legal existence or personality of other persons, including the Walter Canada Group entities. *ERISA* ascribes liability based solely on corporate and other legal relationships.

[131] As the Walter Canada Group argues, it is trite law in British Columbia and Canada that corporations have separate legal personalities from that of its shareholders and that shareholders are not *prima facie* liable for the debts of the corporation: *Salomon v. Salomon & Co*, [1897] A.C. 22 (H.L.). A corporation has the capacity and the rights, powers and privileges of an individual of full capacity: *Business Corporations Act*, S.B.C. 2002, c. 57, s. 30.

[132] The well-known decision in *B.G. Preeco I (Pacific Coast) Ltd. v. Bon Street Holdings Ltd.* (1989), 37 B.C.L.R. (2d) 258 (C.A.) at 266-268 affirmed the sanctity of a corporation's existence per *Salomon* and discussed that the corporate veil may be pierced only in certain and exceptional circumstances. To similar effect, see *Edgington v. Mulek Estate*, 2008 BCCA 505 at paras. 20-25 where, following *B.G. Preeco*, the court stated at para. 21 that the "separate legal personality of the corporation will not be lightly disregarded". These and other cases were recently discussed in *Emtwo Properties Inc. v. Cineplex (Western Canada) Inc.*, 2011 BCSC 1072 beginning at para. 97 to similar effect.

[133] The intention behind, purpose and effect of *ERISA*'s "common control" or "controlled group" provisions are aided by interpretations of those provisions by the U.S. courts. In that respect, Mr. Abrams' expert report is again of assistance. He states at pp. 6-7 of his report:

> Courts have described the operation of ERISA's "controlled group" liability provisions as a "veil-piercing" statute that disregards formal business structures in order to impose liability on related businesses.
>
> ...
>
> As the U.S. Supreme Court has recognized, in place of the "subjective, case-by-case analysis that had previously prevailed," Congress purposefully adopted an "objective test" for determining whether a controlled group exists, based on a "mechanical formula" that establishes "a sharp dividing line that is crossed by incremental changes in ownership." [citing *United States v. Vogel Fertilizer Co.*, 455 U.S. 16, 34 (1982)] Thus, the applicable regulations for withdrawal liability of "controlled groups" establish a "brightline test based purely on stock ownership," and affiliates are not required to have actually exercised control over the employer (or vice versa) or engaged in any wrongdoing or misconduct in order to be liable as a member of the "controlled group."

[134] The citations provided by Mr. Abrams for these comments amply support his summary of the U.S. courts' characterization of *ERISA*'s "controlled group" provisions. Other comments found in the U.S. cases cited by him are equally instructive:

a) the *ERISA* provisions were aimed at "curbing abuses of multiple incorporation": *United States v. Vogel Fertilizer Co.*, 455 U.S.16 (1982) at 36;

b) in *Board of Trustees of Trucking Employees of North Jersey Welfare Fund, Inc. – Pension Fund v. Gotham Fuel Corp.*, 860 F. Supp. 1044 at 1050, the court stated that members of the controlled group are "deemed, by law" to constitute a single entity. At 1050-1051, the court adopted an earlier statement of the legislative intent underlying *ERISA*:

> The legislative background of ERISA ... makes it abundantly clear that, for the purpose of [ERISA], Congress was unconcerned with the actual corporate form of a business. ...Congress instructed ... the

> courts to disregard the corporate form and treat several inter-related corporations are one entity, the ERISA "employer" ...

and also stated:

> Controlled group members are statutorily determined to be 'single entities,' without the necessity of a finding of improper motive or wrongdoing.

c) in *PBGC v. Smith-Morris Corp.*, C.A. No. 94-cv-60042-AA, 1995 US Lexis 22510 at 8 (E.D. Mich. Sept. 13, 1995), the court stated that *ERISA*'s concern is not whether a stockholder who has a controlling share actually exercised control over corporate affairs but simply whether it had "the ability to control," as evidenced through stock ownership;

d) in *Sun Cap. Partners III, LP v. New England Teamsters & Trucking Indus. Pension Fund*, 724 F.3d 129 at 138, the court stated that:

> ... [ERISA's] broad definition of "employer" extends beyond the business entity withdrawing from the pension fund, thus imposing liability on related entities within the definition, which, in effect, pierces the corporate veil and disregards formal business structures. ...

e) finally, in *Cent. States, S.E. & S.W. Areas Pension Fund v. Messina Prods., LLC*, 706 F.3d 874 (7th Cir. 2013), at 877-878, the court stated:

> When an employer participates in a multiemployer pension plan and then withdraws from the plan with unpaid liabilities, federal law can pierce corporate veils and impose liability on owners and related businesses. ...
>
> ...
>
> The [joint and several withdrawal liability] provision's purpose is to "prevent businesses from shirking their ERISA obligations by fractionalizing operations into many separate entities..." (Citing: *Central States, Southeast and Southwest Areas Pension Fund v. White*, 258 F.3d 636, 644 (7th Cir.2001)

[135] The 1974 Plan's expert witness as to U.S. law and specifically, *ERISA*, Judith Mazo, agrees. She describes at paragraph 37 of her report that the "arithmetic rules" or "bright lines" under *ERISA* apply to determine common control. She further states there is no other relevant consideration as to whether *ERISA* applies:

> 44. ... Because the law uses mechanical tests and looks at highly concentrated levels of ownership, it does not matter whether the decision-makers actually exercised their control since they had the power to do so if they chose.

[136] Simply put, the 1974 Plan's claim arises solely by reason of Walter Energy U.S. owning more than an 80% stake in both Walter Resources and the Walter Canada Group entities. Arising from that "arithmetic" rule, *ERISA* dictates that the Walter Canada Group is liable for any withdrawal liability of a signatory (ie. Walter Resources) under the 1974 Plan.

[137] Accordingly, I agree with the Walter Canada Group that *ERISA*'s "controlled group" provisions impose liability by ignoring separate corporate personalities and effectively amalgamating, consolidating or collapsing "common control" entities into a single "employer" liable for any withdrawal liability of any other entity within that group. There can be no dispute that, but for *ERISA*'s provisions, the Walter Canada Group would not be liable for any obligations owing by Walter Resources under the 2011 CBA. It is only by reason of the Walter Canada Group's relationship with Walter Resources, through the indirect corporate ownership of Walter Energy U.S., that such liability arises.

[138] As the U.S. cases note, this is the essence of "lifting the corporate veil" so as to look beyond the corporate personality of Walter Resources and impose liability on other entities within the corporate group through common shareholdings.

[139] My conclusions are consistent with the comments found in *Pension Benefit Guaranty Corp. v. Ouimet Corp.*, 711 F.2d 1085, 6 (1st Cir.1983) where the Court of Appeals, First Circuit allocated a termination liability to certain solvent members of the Ouimet Group:

> On the surface this result may appear to disregard unduly the legal separateness of the corporate entities. There is precedent, however, for piercing the corporate veil in bankruptcy situations. Under its general equitable powers a bankruptcy court may "substantially consolidate" the assets and liabilities of various entities. Substantial consolidation will usually, but not always, involve only debtors and be granted if absolutely necessary for achieving reorganization or protecting creditors' economic interests. ... Some of the facts a court will look for in deciding whether to grant a

> substantive consolidation include the parent owning a majority of the subsidiary's stock, the entities having common officers or directors, the subsidiary being grossly undercapitalized, the subsidiary transacting business solely with the parent, and both entities disregarding the legal requirements of the subsidiary as a separate corporation. ...
>
> There is no need to show that any or all of these factors are present to justify holding the solvent members of the Ouimet Group responsible for the entire liability in this case. Avon's corporate veil was, in effect, pierced by Congress when it enacted the termination liability provisions of ERISA. The corporate form is a creation of state law and states may impose stringent limitations on attempts to disregard it; the factors courts consider in deciding whether to grant substantive consolidations reflect such limitations. These limitations, however, do not constrict a federal statute regulating interstate commerce for the purpose of effectuating certain social policies ... *Corn Products Refining Co. v. Benson*, 232 F.2d 554, 565 (2d Cir.1956) (existence of separate corporate entity may be disregarded when necessary to further the purpose of a federal regulatory statute). Thus, concerns for corporate separateness are secondary to what we view as the mandate of ERISA in this case.
>
> [Emphasis added]

[140] Since *ERISA* is a creature of the U.S. Congress, there is no similar legislation in Canada that might be considered in this characterization exercise. There is no case authority from Canada that addresses *ERISA*, nor any case authority involving the type of characterization exercise involved here. Nevertheless, the Walter Canada Group argues that characterizing the 1974 Plan's claim as one implicating legal personality is consistent with at least one British Columbia authority.

[141] In *JTI-Macdonald Corp. v. British Columbia (Attorney General)*, 2000 BCSC 312, this court considered the constitutionality of the *Tobacco Damages and Health Care Costs Recovery Act*, S.B.C. 1997, c. 41 (the "*Tobacco Act*"). The *Tobacco Act* created a cause of action permitting the government to directly recoup medical costs from the tobacco industry. The *Tobacco Act* defined "manufacturer" broadly and, coupled with the group liability provisions, extended liability to affiliated (perhaps also foreign) companies (see paras. 156-158). Similar to *ERISA*, the *Tobacco Act* "imposed liability upon a foreign defendant not on the basis of wrongful conduct but on the basis of being deemed a member of a group in which another member commits a wrongful act." (para. 233).

[142] I agree with the 1974 Plan that the result in *JTI-Macdonald Corp.* is limited since it arose in the context of a constitutional challenge which is not involved here. Nevertheless, many of the comments of Justice Holmes in respect of the *Tobacco Act* strike a similar chord in terms of what *ERISA* seeks to accomplish as against the Walter Canada Group. I have included lengthy quotes of Holmes J. here, particularly given the degree of reliance placed on this case by the Walter Canada Group:

> [172] The combined effect of [provisions of the *Act*] purport to affect the status, structure and corporate personality of foreign corporations and the rights of their shareholders.
>
> [173] The *Act* has the effect of abolishing the separate corporate personalities of companies incorporated under federal or foreign law with domiciles outside British Columbia.
>
> [174] A company's registered office establishes its domicile. [*Gasque v. Inland Revenue Commissioners*, [1940], 2 K.B. 80; Fraser & Stewart, op. cit. at p.144; *National Trust Co. Ltd. v. Ebro Irrigation & Power Co. Ltd.*, [1954], 3 D.L.R. 326 (Ont.H.C.); *Voyage Co. Industries v. Craster*, [1998] B.C.J. No. 1884 (Unreported) (B.C.S.C.)].
>
> [175] A corporation's domicile determines the law respecting its creation and continuation (corporate personality), matters of internal management, share capital structure, and shareholder rights. [Castel, J.G., Canadian Conflict of Laws 4th ed., (Toronto: Butterworths, 1997) pp.574-575; *Voyage Co. Industries v. Craster*, *supra*; *National Trust Co. Ltd. v. Ebro Irrigation & Power Co. Ltd.*, *supra*; Fraser & Stewart, op. cit. p.144; Palmer's Company Law (looseleaf ed.) Vol. I, (London: Sweet & Maxwell, 1997) pp.2105-2106]:
>
> > Questions concerning the status of a foreign corporation, especially whether it possesses the attributes of legal personality, are, on the analogy of natural persons, governed by the law of the domicile of the corporation. This domicile is in the state or province of incorporation or organization and cannot be changed during the corporation's existence even if it carries on business elsewhere. Thus, the law of the state or province under which a corporation has been incorporated or organized determines whether it has come into existence, its corporate powers and capacity to enter into any legal transaction, the persons entitled to act on its behalf, including the extent of their liability for the corporation's debts, and the rights of the shareholders.
> >
> > [Castel, *supra,* at p.574-575].
>
> [176] It is a fundamental principle of company law that a corporation is a legal entity distinct from its shareholders. [*Salomon v. Salomon & Co. Ltd.*, [1897] A.C. 22 (H.C.); Palmer's Company Law 24th ed., Schmitthoff, C.M. Ed., (London: Stevens & Sons, 1987) pp.200-201; Fraser & Stewart Company Law of Canada 6th ed., (Carswell, 1993) at p.17; *Canada Business Corporations Act*, R.S.C. 1985, c.C-44, S.15(1)].

[177] This distinction is operative in a parent and subsidiary relationship and applies to related corporations owned by a common shareholder. [Fraser & Stewart, op. cit. at p.21, Davies, P.L., Gower's Principles of Modern Company Law 6th ed. (London: Sweet & Maxwell, 1997) at pp.80, 159-163; *BG Preeco I (Pacific Coast) Ltd. v. Bon Street Developments Ltd.* (1989), 60 D.L.R. (4th) 30 (B.C.C.A.)].

[178] There is a distinction in Canadian constitutional law between the power to incorporate and the power to regulate the activities of a company. The power to incorporate a company is the ability to bestow legal personality on an association of persons, regulate a corporate structure and define the rights of shareholders.

[179] A company once incorporated however will be responsible to the laws of jurisdictions in which it operates. A federally incorporated company is, for example, accountable under provincial security laws.

....

[189] The *Act* therefore attempts to alter and derogate from what are clearly domiciliary rights under the law of foreign jurisdictions, ...

...

[205] The *Act* overrides the substantive laws of extra-territorial Canadian or foreign jurisdictions in four major areas:

> (a) in respect of the status and corporate personalities of corporate tobacco manufacturers with domiciles outside British Columbia;
>
> .... and
>
> (d) in respect of shareholder's rights and liabilities regarding shares of federal or foreign corporations.

....

[213] Sections [of the *Tobacco Act*], when they purport to govern the status, structure and corporate personality of a federally-incorporated company under the *Canada Business Corporations Act* are not only extra-territorial in effect they trench upon the exclusive jurisdiction of the Parliament of Canada.

[214] There is much force to the argument that a practical cumulative effect of these provisions of the *Act* is to "amalgamate" or "merge" defendant tobacco companies such that those "amalgamated" by the operation of the provisions of the *Act* incur liability for civil claims against others in the involuntary merger. That is a fundamental interference with a federal jurisdiction reserved under Part XV of the *Canada Business Corporations Act*.

[215] The combined effect of Sections...of the *Act* ignores the separate identities of federally-incorporated companies for the purpose of establishing a tobacco related wrong committed by a related company and for the purpose of calculating amounts assessed against them.

[216] The separate legal personality conferred under s.15(1) of the *Canada Business Corporations Act* is removed and the corporation loses its legal status as distinct from its shareholders.

...

> [218] The provisions of the *Act* appear not so much designed to "pierce the corporate veil" as they are to strip away separate identities and treat them as if they had legally merged or amalgamated. The effect of provisions of the *Act* is not to look through the façade of a company shell; it is to deny the right to any separate corporate existence.
>
> [Emphasis added]

[143] Applying these same comments to *ERISA*, it is clear that the "controlled group" provisions simply disregard the separate corporate personalities of other companies within the Walter Energy Group (including those within the Walter Canada Group) by lifting their corporate veils. It does this by ignoring the separate legal existence and personality of the Walter Canada Group entities (and limited liability per *Salomon*), effectively amalgamating or consolidating those entities, in deeming them to be one "employer" along with Walter Resources.

[144] I agree that *JTI-Macdonald* provides substantial support that a claim which purports to impose liability arising purely as a result of corporate relationships, such as *ERISA* does, are properly classified as claims concerning the status and legal personality of corporations. To use the words of Holmes J., the application of *ERISA* to the Walter Canada Group results in those entities' "separate legal personality" being removed or "stripped away" such that they lose their legal status as distinct from their shareholders.

[145] I agree that the 1974 Plan's claim against the Walter Canada Group, being founded on *ERISA*'s "controlled group" liability provisions, should be characterized as concerning the status and legal personality of corporations and partnerships within the Walter Canada Group.

[146] In conclusion, in my view, the legal nature of the 1974 Plan's claim is appropriately characterized as one of corporate or partnership law and specifically, a claim which results in a challenge to the status and separate legal personalities of the entities within the Walter Canada Group.

(2) What Choice of Law Rule Applies?

[147] Having characterized the claim, I now turn to the second step in the choice of law analysis. This involves a consideration of relevant "connecting factors".

[148] At page 221, Pitel and Rafferty state:

> As we will see, the selection of the connecting factor is critical in formulating the choice of law rule. There are many possible connecting factors. Some are relatively certain and predictable. These include the person's domicile or habitual residence and the place where a specific act occurs, such as the commission of a tort or the making of the contract. These sorts of connecting factors have a relatively narrow focus. They are quite specific and can therefore be described as rigid connecting factors. Other connecting factors have a broader focus and are thought to be more flexible. These include the "proper law" of a contract, ascertained by weighing several factual connections to various legal systems. One of the core debates in choice of law is how rigid or how flexible the connecting factor should be for a particular rule.

[149] It is worthwhile being reminded at this time of Castel & Walker's comment at 3-1, quoted above, that a "connecting factor" is a "fact or element connecting a legal question or issue with a particular legal system" which is then identified as the governing law.

[150] What then are the "connecting factors" to be considered after having characterized the 1974 Plan's claim as I have?

[151] Under Canadian choice of law rules, issues concerning a person's legal personality are governed by the law of the person's domicile: *Castel & Walker* at 30-1, quoted above. Similarly, Pitel and Rafferty state that the "status of non-natural persons is governed by the law of the person's 'home' jurisdiction" (at 245) and that there is a "well-established principle that a corporation's domicile is the country in which it was incorporated" (at 26-27).

[152] To similar effect, Dicey states at 1532-1533:

> Whether an entity exists as a matter of law must, in principle, depend upon the law of the country under which it was formed. That law will determine whether the entity has a separate legal existence. The law of that country will determine the legal nature of the entity so create, e.g. whether the entity is a

> corporation or partnership, and, if the latter, the legal incidents which attach to it.

[153] Domicile was addressed in *National Trust Co. v. Ebro Irrigation and Power Co. Ltd.* [1954] O.R. 463 (S.C.), where the court stated at 476:

> It is well established that the domicile of a corporation is in the country in which it was incorporated. In *Cheshire on Private International Law*, 4th ed. 1952, at pp. 193-4, it is stated that: "Questions concerning the status of a body of persons associated together for some enterprise, including the fundamental question whether it possesses the attribute of legal personality, must on principle be governed by the same law that governs the status of the individual, *i.e.* by the law of the domicil. ... In the case of the natural person it is the domicil of his father, in the case of the juristic person it is the country in which it is born, *i.e.* in which it is incorporated." ...

[154] The Walter Canada Group also refers to *Singer Sewing Machine Co. of Canada Ltd (Re)*, 2000 ABQB 116, a decision of the colourful Registrar Funduk. There, the Alberta court was considering whether to recognize an order from the U.S. Bankruptcy Court. It appears that the U.S. court has assumed jurisdiction not only over the Singer Sewing Machine entities in the U.S., but also over the Canadian subsidiary who only conducted business in Canada and whose assets were held in Canada. The intention of the U.S. court seemed to be toward assuming overall jurisdiction over the entire corporate group in terms of administering assets and presumably, claims against those assets.

[155] This case was decided before amendments to Part IV of the *CCAA* which provides for a robust degree of comity in terms of addressing cross-border insolvencies. Nevertheless, the comments of the Registrar in terms of rejecting what he considered was a collapsing of the Canadian entity and its assets within the broader international group have, in my view, some relevance here:

> 11. Canadian law says that a corporation is a person in law. Canadian law says that a corporation has an existence separate from its shareholders. Canadian law says that a shareholder is not liable for the corporation's debts. Canadian law says that a shareholder does not own the corporation's assets. Canadian law says that a corporation's business activities are not the shareholder's business activities.

[156] Similarly, amalgamation of corporations, characterized as a change of status, is governed by the law of the place of incorporation: *Castel & Walker*, vol. 2, at 30-5. If the merged or amalgamated corporations were incorporated in different jurisdictions, the merger must be valid under the laws of both jurisdictions: *Dicey* 1534. See also *Concept Oil Services Ltd. v. En-Gin Group LLP*, [2013] EWHC 1897 (Comm) at paras. 70-72.

[157] I agree with the Walter Canada Group that the 1974 Plan's claim depends entirely on *ERISA*'s provisions which allow the 1974 Plan to disregard the separate legal personalities of the Walter Canada Group entities as being distinct from that of Walter Resources. The 1974 Plan has not advanced any other theory of liability for its claim under British Columbia law or any other law; rather, it relies exclusively on *ERISA*'s "controlled group" provisions as the basis for its claim against the Walter Canada Group. Further, as I have already stated, the 1974 Plan's claim against the Walter Canada Group does not stem from any conduct by or contract with the Walter Canada Group.

[158] During its submissions, the 1974 Plan did not draw any particular distinction between its claims against the corporations within the Walter Canada Group (who are the only *CCAA* petitioners) and the partnerships, who are not petitioners, but who were granted certain protections under the Initial Order. The claim of the 1974 Plan advanced in its pleading is only as against the "petitioners". The Walter Canada Group suggests that since the 1974 Plan chose to assert its claim only against the "petitioners", any claim against the partnerships is barred pursuant to the claims bar date set under the Claims Procedure Order. I am not sure as to the effect of such a distinction in terms of the recovery under the claims.

[159] This "claims bar date" argument may have some merit, but I do not propose to base my decision as regards the partnerships solely on this basis. The simple answer is that the same analysis set out above in relation to the corporations applies equally to the partnerships, as was noted in Dicey at 1532-33, quoted above, which refers to the law of the country in which an "entity" was formed.

[160] The issue as to whether the Walter Canada Group's separate legal personalities can be ignored is subject to the Canadian choice of law rule that the status and legal personality of a corporation is governed by the law of the place in which it was incorporated, namely British Columbia and Alberta. Here, as with the corporations within the Walter Canada Group, both with limited liability and unlimited liability, it is admitted that all of the partnerships were organized under British Columbia law. Accordingly, the choice of law analysis leads to the same result in relation to the partnerships, namely British Columbia law, including under the *Partnership Act*, R.S.B.C. 1996, c. 348.

[161] The place of incorporation or organization is a matter of public record and all persons who would do business with or otherwise deal with the Walter Canada Group entities would or should be well aware of that fact.

[162] I agree that, under Canadian choice of law rules, the place of incorporation or organization of the Walter Canada Group entities is the appropriate "connecting factor" in relation to the issue arising from the 1974 Plan's claim. As a result, British Columbia and Alberta law determine whether the separate legal personalities of the Walter Canada Group entities can be ignored.

[163] The 1974 Plan also made substantial submissions concerning the choice of law rule applicable to its claim. Relying on this Court's analysis in *Minera* at paras. 184-207, the 1974 Plan asserts that one must consider which law has the "closest and most real connection" to the issue. Its further submissions are that the court must examine a non-exhaustive list of factors in that context (*Minera* at para. 200). This, of course led to the 1974 Plan's objection to this summary hearing and its positon that, since it has been denied any discovery from the Walter Energy Group, it has been hampered in its ability to put into evidence all relevant factors at this summary hearing.

[164] However, the analysis in *Minera* was made in the context of the Court's conclusion that the choice of law rule that applied to the unjust enrichment claim was the "proper law of the obligation". In addition, contrary to the two-step approach

illustrated in *Minera*, at the end of its submissions, the 1974 Plan's argument essentially conflated that process by suggesting that the Court should consider connecting factors (most of which it says have yet to be disclosed through discovery from the Walter Canada Group) in the characterization exercise in the first step.

[165] Rejecting the 1974 Plan's contention that its claim should be characterized as one of contract inevitably leads to the further conclusion that the appropriate choice of law rule is not the "proper law of the obligation".

[166] Accordingly, I do not intend to address the 1974 Plan's detailed submissions on the second step within the choice of law issue other than to briefly comment on certain aspects.

[167] The 1974 Plan argued that even if I accepted the characterization of the claim advanced by the Walter Canada Group, the Court would still need to address facts other than the place of incorporation. These facts were said to include the degree to which the Walter Canada Group was managed out of the U.S. and an understanding of the Walter Energy Group's global business. I reject these submissions on the basis of the above authorities. There is no need to look beyond the clear facts that when these Canadian entities were incorporated or organized, they were expressly created within these Canadian jurisdictions with the intention that their legal status and personality would be governed by Canadian laws. The same comment could presumably be made concerning the U.S. and English entities.

[168] The 1974 Plan argued that the "proper law of the obligation" approach would allow this court to consider the connecting factors that exist between the 1974 Plan's claim and the Walter Canada Group, including the degree to which the U.S. and Canadian operations were integrated, citing *Imperial Life Assurance Co. of Canada v. Colmenares*, [1967] S.C.R. 443 at 448 and *Minera*.

[169] However, my conclusions above have the effect of rendering moot the 1974 Plan's objections arising from the lack of discovery. In addition, it is clear enough that even if there was no degree of integration or management between the U.S.

and Canadian entities, the 1974 Plan's position is that all "contract" factors point to the U.S. - including the contractual documents, the location of and management of the 1974 Plan, the location of Walter Resources (the only counterparty to the 2011 CBA), that the benefits under the 2011 CBA are for Walter Resources' U.S. employees and that the withdrawal by Walter Resources from the 1974 Plan arose in the U.S. As I have emphasized, as regards the choice of law analysis, there is absolutely no contractual connecting factor between the 1974 Plan and the Canadian entities.

[170] In that regard, it is difficult to conceive (although I need not decide the issue) that any Canadian court would conclude that these "contractual" connecting factors pointed to anything other than the U.S. Any degree of integration or joint management could only add to such arguments; conversely, it is difficult to see that any lack of integration or joint management would detract from them.

[171] On this last point (ie. the degree of integration), what emerges as crystal clear from the 1974 Plan's position, supported by Ms. Mazo's opinion, is that *ERISA* expressly makes such a factual enquiry entirely irrelevant. The "bright line" or "arithmetic" test under *ERISA* entirely disregards anything other than the level of stock ownership: see *Pension Benefit Guaranty Corp. v. Ouimet Corp.*, 470 F.Supp 945 (1975).

[172] Other so-called "connecting factors" suggested by the 1974 Plan are bizarre to say the least. The 1974 Plan suggests that Walter Energy U.S. will be "enriched" given the potential payment of estate funds to that corporate level after payment to the Canadian creditors. This is hardly a relevant consideration. Further, any recovery available to the 1974 Plan against the U.S. entities is entirely driven by U.S. law, including *ERISA*, the Chapter 11 Proceedings and its participation in the Settlement Term Sheet. If the 1974 Plan obtains no recovery from the U.S. entities within the Walter Energy Group, that is of no moment as regards its claim against the Canadian entities.

[173] The other "connecting factor" said to arise by the 1974 Plan is that the application of Canadian law works an injustice on the 1974 Plan "because of the removal of assets out of reach of *ERISA*". This proposition begs the very question as to whether *ERISA* applies to the Walter Canada Group at all. If *ERISA* does not apply to the Walter Canada Group in these circumstances, the Canadian assets were never within reach of the 1974 Plan.

[174] The 1974 Plan further argues that accepting the Walter Canada Group's argument on choice of law would result in a "blanket denial" of all *ERISA* claims against Canadian entities in Canadian courts. In my view, this is an exaggeration. Canadian law allows for the imposition of liability on persons in a variety of ways - including tort and fraud (see *B.G. Preeco*). This decision is only intended to address whether these Canadian entities are subject to *ERISA* which seeks to impose liability on them, not by reason of any conduct or contract, but simply by reason of a corporate relationship.

[175] The 1974 Plan also suggests that a decision that *ERISA* does not apply to the Walter Canada Group would threaten principles of international comity in that a Canadian court could not recognize a judgment made by a U.S. court in respect of a Canadian entity for withdrawal liability under *ERISA*. This other "chicken little" argument is entirely speculative. Firstly, this case does not involve any judgment obtained against the Walter Canada Group. Further, in my view, my decision does not detract from the well-entrenched and long standing comity that has existed between Canada and the U.S. courts, particularly in the field of insolvency.

[176] As described above, the only facts and connecting factors relevant here given my characterization of the 1974 Plan's claim are uncontroversial and have been admitted. In these circumstances, I see no difficulty in proceeding to determine this matter in a summary fashion, based on the considerations discussed earlier in these reasons.

[177] In conclusion, I find that the 1974 Plan's claim is characterized as one of corporate or partnership law and specifically, one relating to the status, legal

existence and personality of corporations and partnerships. The appropriate choice of law rule is one of domicile or place of incorporation or organization. In the case of the entities within the Walter Canada Group, that is British Columbia or Alberta.

[178] *ERISA* is not part of British Columbia or Alberta law. Accordingly, the 1974 Plan's claim must fail for that reason.

VIII THE SECOND AND THIRD QUESTIONS

[179] The second and third issues posed by the Walter Canada Group are:

> If the 1974 Plan's claim against the Walter Canada Group is governed by United States substantive law (including *ERISA*), then as a matter of U.S. law, does "controlled group" liability for withdrawal liability related to a multiemployer pension plan under *ERISA* extend extraterritorially?
>
> If the 1974 Plan's claim against the Walter Canada Group is governed by U.S. substantive law (including *ERISA*), and *ERISA* applies extraterritorially, is that law unenforceable in Canada because it conflicts with Canadian public policy?

[180] As I noted above, the Walter Canada Group only needed to succeed on one of the questions raised in this application in order to defeat the 1974 Plan's claim.

[181] Accordingly, having found in favour of the Walter Canada Group on the first issue, it is not necessary to decide the other two questions. While they pose interesting issues, I see no need to delay these proceedings further in order to consider and decide those issues. A timely resolution is in the interests of justice and furthers the purposes of the *CCAA*.

IX CONCLUSION

[182] In conclusion, I grant a declaration that, under Canadian conflict of laws rules, the 1974 Plan's claim as against the Walter Canada Group is governed by Canadian substantive law and not U.S. substantive law (including *ERISA*).

[183] Costs are awarded against the 1974 Plan in favour of both the Walter Canada Group and the Union on the usual scale. If any party should wish to seek a different order of costs, such an application must be filed within 30 days of the release of

these reasons and the hearing to determine the matter should be set as soon as possible. Failing such application(s) being filed, my costs award shall stand.

"Fitzpatrick J."

Schedule "B"

Updated CCAA Cash Flow Forecast for the 20-Week Period Ending September 30, 2017

New Walter Energy Canada Holdings, Inc. et al.

Updated CCAA Cash Flow Forecast for the 20-Week Period Ending September 30, 2017[1]

(in CAD $000's)																			
Foreign Exchange Rate Assumptions - (USD/CAD) 1.38 and (GBP/CAD) 1.77																		Month End	20-Week
Week No.		1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	4 weeks	Total
Week Ending	Notes	5/20/17	5/27/17	6/3/17	6/10/17	6/17/17	6/24/17	7/1/17	7/8/17	7/15/17	7/22/17	7/29/17	8/5/17	8/12/17	8/19/17	8/26/17	9/2/17	9/30/17	
OPERATING CASH FLOW																			
Operating Receipts																			
Other Receipts	2	-	-	5	-	-	-	5	-	-	-	-	5	-	-	-	5	5	25
Total Operating Receipts		**-**	**-**	**5**	**-**	**-**	**-**	**5**	**-**	**-**	**-**	**-**	**5**	**-**	**-**	**-**	**5**	**5**	**25**
Operating Disbursements																			
Director's Fees	3	-	-	(12)	-	-	-	(12)	-	-	-	(12)	-	-	-	-	(12)	(12)	(60)
Consulting	4	(17)	-	(21)	-	-	-	(21)	-	-	-	(21)	-	-	-	-	(21)	(21)	(122)
Insurance	5	-	-	-	-	-	-	-	-	-	-	(25)	-	-	-	-	-	-	(25)
Information Technology	6	(1)	-	-	-	-	-	(1)	-	-	-	(1)	-	-	-	-	(1)	(1)	(5)
Total Operating Disbursements		**(18)**	**-**	**(33)**	**-**	**-**	**-**	**(34)**	**-**	**-**	**-**	**(59)**	**-**	**-**	**-**	**-**	**(34)**	**(34)**	**(212)**
Non-Operating Disbursements																			
CRO and Restructuring Advisor Fees	7	(152)	-	(175)	-	-	-	(300)	-	-	-	(475)	-	-	-	-	(250)	(175)	(1,527)
Walter U.K. Funding	8	-	-	-	-	(177)	-	-	-	(177)	-	-	-	(177)	-	-	-	(89)	(620)
Belcourt-Saxon J.V. Funding	9	-	-	-	(200)	-	-	-	-	-	-	-	-	-	-	-	-	(225)	(425)
Distribution of Trust Funds	10	-	-	-	-	-	-	-	(782)	-	-	-	-	-	-	-	-	-	(782)
Total Non-Operating Disbursements		**(152)**	**-**	**(175)**	**(200)**	**(177)**	**-**	**(300)**	**(782)**	**(177)**	**-**	**(475)**	**-**	**(177)**	**-**	**-**	**(250)**	**(489)**	**(3,354)**
TOTAL NET CASH FLOW	11	**(170)**	**-**	**(203)**	**(200)**	**(177)**	**-**	**(329)**	**(782)**	**(177)**	**-**	**(534)**	**5**	**(177)**	**-**	**-**	**(279)**	**(518)**	**(3,541)**
BEGINNING CASH (FX Effected)		64,553	64,383	64,383	64,180	63,980	63,803	63,803	63,474	62,692	62,515	62,515	61,981	61,986	61,809	61,809	61,809	61,530	64,553
Net Cash Flow		(170)	-	(203)	(200)	(177)	-	(329)	(782)	(177)	-	(534)	5	(177)	-	-	(279)	(518)	(3,541)
ENDING CASH (FX Effected)		64,383	64,383	64,180	63,980	63,803	63,803	63,474	62,692	62,515	62,515	61,981	61,986	61,809	61,809	61,809	61,530	61,012	61,012

UNAUDITED CASH FLOW FORECAST PREPARED BY MANAGEMENT, MUST BE READ IN CONJUNCTION WITH THE NOTES AND ASSUMPTIONS

New Walter Energy Canada Holdings, Inc. et al ("Walter Canada")

Notes to the Unaudited Updated CCAA Cash Flow Forecast for the 20-Week Period Ending September 30, 2017

Unless otherwise noted, the Updated CCAA Cash Flow Forecast is presented in Canadian Dollars using an exchange rate of US$1.00/CDN$1.38 for conversion of any U.S. Dollar amounts and an exchange rate of GBP£1.00/CDN$1.77 for conversion of any British Pound amounts.

1. **Purpose**
   The Updated CCAA Cash Flow Forecast has been prepared solely for the purpose of reflecting Management's best estimate of the cash flow of Walter Canada during its CCAA proceedings, and readers are cautioned that it may not be appropriate for other purposes.

Receipts

2. **Other Receipts**
   Amounts forecast represent interest expected to be earned on various short term investments purchased with Walter Canada's cash holdings.

Operating Disbursements

3. **Director's Fees**
   Monthly compensation costs for Walter Canada's sole director.

4. **Consulting**
   These disbursements relate to costs of an external consultant engaged to perform consulting in respect of Walter UK.

5. **Insurance**
   The current insurance coverage for Directors and Officers expires on June 30, 2017. Renewal costs are expected to be incurred in July 2017.

6. **Information Technology**
   Forecast payments represent expected costs to maintain use of an electronic data room.

Non-Operating Disbursements

7. **CRO and Restructuring Advisor Fees**
   Forecast disbursements for professional fees specific to Walter Canada's restructuring efforts including Walter Canada's counsel, the Monitor and its counsel and the Chief Restructuring Officer. Fees are expected to be higher in the short term to facilitate the sale of Walter Canada's 50% interest in the Belcourt-Saxon Coal Ltd. and Belcourt

Saxon Coal Limited Partnership (the "**Belcourt Interest**") as well as the preparation for and attendance at the Court hearing relating to the 1974 Pension Plan's upcoming application to seek leave to appeal the decision of the Honourable Madam Justice Fitzpatrick.

8. **Walter UK Funding**
   The forecast payments represents potential advances, on a secured basis, in the amount of £350,000 (approximately $620,000) by Walter Canada to Walter UK as Walter UK is expected to require funding in the near term.

9. **Belcourt-Saxon J.V. Funding**
   In order to maintain its Belcourt Interest, Walter Canada advances periodic payments to renew certain coal licenses belonging to the joint venture. The next anticipated payment of $200,000 is scheduled to occur in June 2017, with another expected payment of $225,000 to be made in September 2017 if the sale of the Belcourt Interest has not been completed by that time.

10. **Distribution of Trust Funds**
    Pursuant to the March 13, 2017 order of this Honourable Court, the Monitor has been ordered to disburse the approximately $782,000 held in trust (the "**Fund**") to the former employees of Walter Canada who are entitled to receive a *pro rata* share of the Fund. The Fund will be distributed by the Monitor upon the completion of Service Canada's review of possible employment insurance overpayments. The Fund was paid to the Monitor from counsel to the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, Local 1-424 on March 15, 2017.

11. **Success Fees**
    Payment of a success fee is outstanding in respect of the transaction which was completed in December 2016. However, this payment is not expected to be made until all remaining transactions have been completed and, as such, has not been included in the Updated CCAA Cash Flow Forecast.